Supreme Court, U. S.
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NO. 65, ORIGINAL

* * *

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

* * *

THE STATE OF TEXAS,
Plaintiff

V.

THE STATE OF NEW MEXICO,
Defendant

* * *

PETITION FOR REHEARING

* * *

Respectfully submitted,

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Pursuant to Rule 58 of the Rules of the Supreme Court, the State of Texas respectfully petitions for rehearing of its Exceptions to the Report of the Special Master in this cause, and in support thereof shows the Court the following:

On May 19, 1980, this Court issued its per curiam opinion approving the Special Master's Report and overruling both parties' Exceptions. Justice Stevens dissented, stating that the language of the Pecos River Compact indicated the signatory states' intent to define the "1947 condition" by means of the original routing study which accompanied the compact.

Original actions are implicitly recognized as one of the less favored children within the Supreme Court's jurisdiction, *cf. Arizona v. New Mexico*, 425 U.S. 794 (1976); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972). This may account for a natural tendency to defer to

reports of special masters in such cases, especially when it appears that the master proposes a reasonable solution to a difficult and complex controversy.

Texas suggests, however, that such deference is inappropriate in the case at bar. The Special Master's Report, while presenting a superficially reasonable solution, serves neither the best interest of the parties to this litigation nor the interests of this Court in the final analysis.

The importance and desirability of interstate compacts as a means of resolving disputes between states, a means preferable to this Court's original jurisdiction, is well recognized, *e.g.*, *Colorado v. Kansas*, 320 U.S. 383 (1943); *Washington v. Oregon*, 214 U.S. 205 (1909). Approval of the Special Master's decision in this case seriously impairs the viability of interstate compacts.

As recognized in Justice Stevens' dissent, more fully discussed in Texas' Objections to the Report of the Special Master, the drafters of the Pecos River Compact carefully tied the term "1947 condition" to the original 1947 condition routing study. By approving the Master's Report, this Court allows a substantial modification of the original interstate agreement. The per curiam opinion, combined with the dissenting opinion, stands for the proposition that a state suffering under the sometimes heavy burden imposed by an interstate river compact may hope for some relief of that burden from the Court.

Two products of the decision are likely. First, the utility of interstate compacts will be reduced; refusal to comply with burdensome compact provisions will become more frequent as states realize they have an opportunity to better the original agreements reflected by their compacts. Second, more frequent resort to this Court's original jurisdiction will necessarily be sought by states which are the beneficiaries of the compact

provisions. Neither result is desirable, and both are avoidable if the Pecos River Compact's literal terms are given effect in this case.

CONCLUSION

While the Master's Report presents a superficially reasonable and equitable solution to this interstate controversy, it fails to honor the intent and express provisions of the Pecos River Compact. For this reason, it should be reversed. Such action by this Court would not only properly resolve the case at hand, it would constitute an endorsement of interstate compacts in preference to its own original jurisdiction as the proper means of resolving interstate disputes. Texas urges the Court to grant this Petition for Rehearing and reverse its decision affirming the Master's Report and overruling Texas' Exceptions to that report.

Respectfully submitted,

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PROOF OF SERVICE

I, DOUGLAS G. CAROOM, Assistant Attorney General of the State of Texas, one of the attorneys for the Plaintiff herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of _____, 1980, I served copies by First Class Mail, Postage Prepaid, to counsel for the State of New Mexico and the United States.

_____

DOUGLAS G. CAROOM

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CLERK

No. 65, Original

In the Supreme Court of the United States

STATE OF TEXAS, *Plaintiff*

v.

STATE OF NEW MEXICO, *Defendant*

UNITED STATES OF AMERICA, *Intervenor*

REPORT AND RECOMMENDATIONS

Jean S. Breitenstein
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STATE OF NEW MEXICO,
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UNITED STATES OF AMERICA,
Intervenor

REPORT AND RECOMMENDATIONS OF SPECIAL MASTER

INTRODUCTION

The Special Master believes that submission of this Report and Recommendations is appropriate under the 1975 order of his appointment. 423 U.S. 542. The case presents a controversy over the Pecos River Compact, intended by the signatory States to apportion the use of the waters of the Pecos River. The Compact contemplates continuing administration of the Pecos in conformity with Compact terms.

With stated exceptions, the Compact imposes on New Mexico, the upstream State, an obligation not to deplete the state line flow below that available to Texas under the "1947 condition." The genesis of the controversy was the meaning of "1947 condition." The Master rejected the conflicting contentions of the States and defined the phrase. The Court approved his definition. 446 U.S. 540. The legal definition must be translated into water quantities to provide a numerical standard for measurement of compliance. The States have long disagreed, and continue to disagree, over the quantification of stream flows. The Pecos River Basin presents a unique situation which requires the determination and use of variable and unmeasurable values and

the application of hydrological techniques for analysis of stream flows.

The Compact created the Pecos River Commission as an administrative agency to perform the required tasks. For twenty years, including seven years since this suit was filed, the Commission has not performed the duties, and exercised the powers, delegated to it. The reason is an impasse resulting from the Compact requirement of unanimous approval of Commission action. The States concede the impasse but disagree on the remedy.

Texas asks the Court to perform the Commission's duties and exercise its powers. New Mexico says that the Court may not perform administrative responsibilities and asks that the action be dismissed. The Master believes that resolution of the controversy requires the adoption of some method to break the deadlock. This Report presents the Master's recommendations and his supporting reasons.

Because of the use of acronyms and technical terms in the Record, this Report, and the Master's 1977 and 1979 Reports, a Glossary is appended as Appendix A. It is noted that S.D. 109 refers to the report of the Chairman of the Senate Interior and Insular Affairs Committee to the United States Senate when the bill for congressional consent to the Compact was pending. See Senate Document 109, 81st Cong. 1st Sess.

RECOMMENDATIONS

The Master recommends that:

(1) The New Mexico motion to dismiss the action be denied.

(2) The Texas motion to substitute double mass analysis for river routing be denied without prejudice to consideration and action thereon by the Pecos River Commission.

(3) The United States representative on the Pecos River Commission, or a third party, be vested with power to participate and act in all Commission deliberations and to vote to resolve any impasse created by failure of the

representatives of Texas and New Mexico to agree.

(4) Texas and New Mexico be ordered to return forthwith to the Pecos River Commission for performance by it of the duties, and exercise by it of the powers, delegated to it by the Compact.

(5) The Court retain jurisdiction of the case.

BACKGROUND

A physical description of the Pecos River Basin appears in the Master's 1979 Report, pp. 5–10. The Basin has three main divisions: (1) the New Mexico area above Alamagordo, (2) the New Mexico area between Alamagordo and the New Mexico-Texas state line, and (3) the Texas area below the state line. The Alamagordo-state line area is important to the controversy.

A history of the controversy appears at pp. 10–11 of the Master's 1979 Report. The interstate dispute, which began about 1914, resulted in the Pecos River Compact ratified by the States and consented to by Congress in 1949. 63 Stat. 159. A copy of the Compact is appended as Appendix B.

For its administration, the Compact creates, Art. V, an agency known as the "Pecos River Commission" and composed of one representative each of the United States, New Mexico, and Texas. The United States representative "shall not have the right to vote in any of the deliberations of the Commission," Art. V(a).

Apportionment of stream flow is made by the Art. III (a) obligation on New Mexico which provides:

> ". . . New Mexico shall not deplete by man's activities the flow of the Pecos River at the New Mexico-Texas state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition."

The phrase "deplete by man's activities" is defined by Art. II (e) and excludes therefrom "diminution of such [Pecos River] flow by encroachment of salt cedars or other

like growth, or by deterioration of the channel of the stream."

The term "1947 condition" is defined as "that situation in the Pecos River Basin as described and defined in the Report of the Engineering Advisory Committee." Art. II (g).

Unless otherwise ordered by the Commission the determination of stream flows is made by the "inflow-outflow method." Art. VI (c). The Commission has adopted no other method.

"The inflow-outflow method involves the determination of the correlation between an index of the inflow to a basin as measured at certain gaging stations and the outflow from the basin." See Inflow-outflow Manual adopted by the Compact negotiators and appearing at S.D. 109, p. 149.

The engineering advisors to the Compact negotiators presented a series of river routing studies. Such a study purports to show numerically quantitative stream flows at various points and times. The negotiators approved and acted on the study entitled, "Summary of Operations 1947," S.O. 1947. A summary of that study is attached as Appendix A to the Master's 1979 Report.

In 1949 the Commission had difficulty in determining the 1947 condition as presented by S.O. 1947 and as operationally directed by the Inflow-outflow Manual. The Commission directed the engineers to "determine more accurately the 1947 Condition as defined in the compact," and to study and investigate "the items recommended in the Inflow-Outflow Manual." See Master's 1979 Report, p. 27. For a more detailed statement of Commission action, see the August 1, 1978, Statement of New Mexico "River Commission Administrative History."

In 1960 the engineers presented, and in 1962 the Commission adopted for limited purposes, "Report on Review of Basic Data," RBD. RBD is a river routing study comparable to S.O. 1947 but using a different period, revised USGS records, different assumptions, and different hydrologic and mathematic procedures than those used in S.O. 1947. A copy of the RBD routing study, similar in style to

the S.O. 1947 study, is attached to the Master's 1979 Report as Appendix B.

Using RBD, the Commission found an aggregate negative state line departure by New Mexico for the period 1952–1961 of 5,300 acre feet. The Commission did not determine whether the departure was caused by the activities of man. Minutes of Commission November 9, 1962, meeting, Stip. Ex. 4 (b), vol. 1, pp. 256–258. At the same meeting the engineers were directed to proceed with a draft of a new inflow-outflow manual. Id. p. 258.

No new inflow-outflow manual was ever adopted. After 1962, Compact administration was frustrated by the Compact permitted one-state veto. Proposals of Texas were rejected by New Mexico and vice versa. The Master believes that each state in good faith urged acceptance of its Compact interpretation and its position on basic facts and accounting techniques. Texas responded to the stalemate in 1974 by its motion for Court permission to file the complaint in the instant suit.

REASONS FOR CONTROVERSY

The controversy is before the Court because the Commission has been unable to resolve it by performing and exercising the powers delegated to it by the Compact. State vetoes, permitted by the Compact, resulted from disputes between the States over basic facts and accounting techniques.

The Compact made the disputes inevitable. It requires administration by the inflow-outflow method, a method intended to account for stream flows and to relieve an upper state from responsibility for the failure of nature to provide precipitation which creates stream flow. The method requires the establishment of a base relationship between inflow indices and outflow quantities. Annual relationships are determined and compared to the base to determine delivery departures, either affirmative or negative. The application of the inflow-outflow method to the Pecos River presents many complications.

Both the inconstancy of rainfall and the geologic conditions of the Pecos Basin present unique complications. A 1942 Report of the National Resources Planning Board, Stip. Ex. 11 (b), p. 12, says:

> "As a consequence of gains resulting from the inflow of flood waters, spring and other ground waters, and return flow, and of losses resulting from irrigation, consumption by native vegetation, reservoir evaporation, channel losses, and reservoir leakage, the flow of the Pecos River from the upper to the lower basin is extremely variable. *In fact, in the absence of flood inflows, the normal basic flow is entirely lost and reestablished many times in the length of the stream.*" [Emphasis supplied.]

The Compact negotiators were told, S.D. 109, p. 2, that: "The water supply [of the Pecos] is not sufficient adequately to serve present development." The negotiators were faced with the apportionment of an inadequate flow of an inconstant, and at times disappearing, stream. The tools given to the Commission for Compact administration proved as unreliable as the stream flows. Admittedly, both the 1947 routing study and the Inflow-outflow Manual contained mistakes, inconsistencies, omissions and uncertainties. The difficulties were recognized as early as a 1949 meeting of the Commission held about six months after the grant of congressional consent to the Compact. See Master's 1979 Report, p. 27.

The complexity is shown by the S.O. 1947 and RBD routing studies attached to the Master's 1979 Report as Appendices A and B respectively. Except for year identification, all of the hundreds of numbers appearing in those studies are computed values. Many of the values shown are both unmeasured and incapable of measurement. Their computation depends on assumptions and mathematic equations, neither of which are identified with certainty. Over half of the inflow indices are derived from unmeasured, but computed, flood inflows.

The disputes center around stream accretions and channel losses and involve substantial quantities of water. The

accretions and losses are not capable of measurement and must be computed. Among the methods used are water budget and hydrograph scalping. The results obtained are used to produce graphs intended to show the base relationship. The S.O. 1947 graph is found as Plate 2 in S.D. 109, p. 154. RBD contains a revised Plate 2 found at Stip. Ex. 5, p. 9. The location of the curve is determined by the application of the theory of least squares to the indicator points. The parties differ whether certain curves of the graphs should be determined by the "best fit" or "envelope" method. The parties differ whether certain flood years should be included in the determination of the relationship. None of the mentioned disputes was resolved by the Commission. The Commission's inaction produced this suit.

HISTORY OF LITIGATION

In 1975 the Court granted leave to Texas to file its complaint, 421 U.S. 927, and the Master was appointed later that year, 423 U.S. 942. The complaint alleges, paragraphs IV and V, that New Mexico has breached the Compact by permitting depletions by man's activities to the extent that there has been a cumulative departure of 1,200,000 acre-feet from that available under the 1947 condition as defined in the Report of the Engineering Advisory Committee and applied by the Inflow-outflow Manual. Paragraph VI charges that New Mexico through its Compact Commissioner has refused to apply the Compact principles and thus deprived Texas of water. Further allegations go to injury and remedy.

The New Mexico answer denies specific allegations of Paragraphs IV and VI and all of Paragraph V. The answer also asserts several affirmative defenses.

The United States was permitted to intervene. 423 U.S. 1085. The Master rejected the New Mexico affirmative defenses in a Report which the Court received and ordered filed. 434 U.S. 809.

On October 31, 1977, the Master entered a Pre-Trial Order approved by each State. The Order required the Master to first hear and determine three issues:

(1) Paragraph 4 (a) – the obligation of New Mexico to Texas under the Compact;

(2) Paragraph 4 (b) – the modification or correction of eleven specified items (essentially these were differences between S.O. 1947 and RBD);

(3) Paragraph 4 (c) – the modification or correction of the Inflow-outflow Manual.

At evidentiary hearings on the three issues, many exhibits were received and expert testimony was adduced on hydrologic, engineering, and mathematical procedures. The Master thought that if the States had a good faith desire to make the Compact workable, their engineers should be able to agree on many of the essential facts and procedures. Pursuant to a verbal order acquiesced in by the States, a meeting was held October 2–4, 1978. In attendance were two engineers from each State, the Master's technical assistant, and the Master's law clerk. The proceedings were reported and transcripts filed. See Tr. Vol. XXIII–XXVIII, pp. 2371–2914. The meeting was unproductive. No agreements were reached.

The Master's February 2, 1979, Report contained his conclusions on the ¶ 4(a), (b), and (c) issues. As to ¶ 4(a), he defined the 1947 condition. As to ¶ (b), he found the evidence insufficient to justify any conclusions on substantial differences. As to ¶ 4 (c), he held that a new Inflow-outflow Manual was required. Each State objected to his rulings on the ¶ 4(a) and (b) issues and accepted his ruling on the ¶ 4(c) issue.

The Master then separated the ¶ 4(a) issue from the others. Counsel assured him that if ¶ 4(a), New Mexico's Compact obligation to Texas, was resolved, the door would be opened for Compact administration. With regard to ¶ 4(a), Texas contended that the 1947 condition was immutably defined by the 1947 routing study. New Mexico argued that the Compact protected all New Mexico uses of Pecos water occurring in 1947. The Master rejected the

contentions of each State and defined the 1947 condition thus:

> "The 1947 condition is that situation in the Pecos River Basin which produced in New Mexico the man-made depletions resulting from the stage of development existing at the beginning of the year 1947 and from the augmented Fort Sumner and Carlsbad acreage."

The Court approved the Master's Report in all respects. 446 U.S. 540.

The Master realized that whatever definition of the 1947 condition might be made, the differences exemplified by the ¶ 4(b) issues would have to be resolved. He concluded that the resolution of the ¶ 4(b) issues should go forward while the ¶ 4(a) issue was before the Court. Pursuant to the Master's August 20, 1979, Order, New Mexico proposed a schedule to which Texas agreed at a September 17, 1979, hearing. The schedule increased the ¶ 4(b) issues from 11 to 37 and provided for exchanges of ideas and views with completion in June, 1980.

By April and June, 1980, letters, Texas told New Mexico that the Texas studies were running behind schedule and requested that no action be taken until the Court ruled on the Texas petition for rehearing of the Court's May 18, 1980, decision approving the Master's Report. Rehearing was denied on June 30, 1980. 448 U.S. 907.

During the summer and fall of 1980, correspondence, hearings, and orders failed to produce any progress. A September 18, 1980, letter from Texas counsel said that a Dr. Charnes had suggested "improved statistical treatment of the data." To support objections to a Master's Order, Texas filed an affidavit of Dr. Charnes, Master's Ex. 20, saying that he had reviewed S.D. 109, RBD, and the Texas studies and had concluded:

> "After studying and reviewing these documents and after several meetings and conferences with the staff of the Texas Department of Water Resources and/or Attorney General's Office, I reported my opinion in late August that not only the Department studies, but the studies of Senate Document 109 and Review of Basic Data were

> bject to serious criticism for a number of different reasons, *including the use of inconsistent and outdated statistical techniques which frequently allow, or even compel, a numeric description of the river's performance which we know is incorrect.*" [Emphasis supplied.]

The statement was a change from the position originally taken by Texas in the case. Previously, Texas had upheld and relied on the S.D. 109 routing studies.

On January 14, 1981, the Master ordered (1) Texas to file its final statement on the ¶ 4(b) issues by April 14, 1981, and (2) New Mexico to inform the Master by June 8, 1981, the time it would require to review the Texas position. On April 14, 1981, Texas filed with the Master a document entitled, "Texas Paragraph 4(b) Submission" in which Texas proposed:

> "a new inflow-outflow relationship depicting the 1947 condition as defined by the Special Master, based upon a double mass streamflow analysis."

A report of Drs. Charnes and Heaney was submitted. Master's Ex. 20(b). It recommends that streamflows and relationships be determined by the double mass analysis method instead of the river routing studies on which Texas had previously based its position. Texas did not state its position on the ¶ 4(b) issues as it had been required to do in the Master's January 14 order.

In response New Mexico said that the Texas submission violated the Master's Order and sought an impermissible rewriting of the Compact. New Mexico further said that it was willing to negotiate with Texas on the use of the double mass analysis but that such negotiations would take at least two years. After a July 27, 1981, hearing the Master ordered the States to negotiate for ninety days and report the result. In November, 1981, the States reported their inability to agree.

After a hearing the Master entered an order on December 29, 1981, vacating the ¶ 4(b) portion of the 1977 Pre-Trial Order. His reasons were: (1) the failure of the States either to agree or to state their final positions on the issues posed by ¶ 4(b); (2) the Texas rejection of both the 1947

routing study and RBD as a method of Compact administration ended the need for consideration of the differences between the 1947 routing study and RBD; and (3) a new inflow-outflow manual was necessary.

The Master held that administration of the Compact must accord with the inflow-outflow method and that such method requires determination of: (1) the basic facts pertinent to stream flows and other conditions in the Pecos River Basin above the state line; (2) the determination of unmeasured values pertinent to the establishment of the relationships necessary to the operation of the inflow-outflow method; (3) the determination of techniques, principles, and procedures which must be used in applying the basic facts and unmeasured values to fix the base and annual relationships essential to the operation of the inflow-outflow method; and (4) the preparation of a new inflow-outflow manual.

The Master defined basic facts as those matters of actual existence or occurrence which are capable of measurement by accepted standards. He defined unmeasured values as those matters which are not capable of measurement by accepted standards.

The Master outlined several legal issues on which he desired a statement of position by each State. The Order specifically provided the procedure to be followed.

In January, 1982, Texas filed a number of documents relating to basic facts, unmeasured values, and techniques, and a motion "to Use the Double Mass Inflow-outflow Method to account for Stream flows in the Determination of the 1947 Condition Base Relationship." Texas also presented its statements of position on the legal issues raised by the December 29, 1981, Order.

In February, 1982, New Mexico made similar filings and presented two motions. The first requested additional time to review certain Texas material which New Mexico said it had not had sufficient time to consider. Reference was made to channel losses and base flows. The other motion was that the Master "Recommend Final Decree and Dismissal."

At a March 8-16 hearing, evidence was received and arguments heard. At the conclusion the Master decided that New Mexico was entitled to an opportunity to rebut the Texas evidence and claims on the mentioned issues. The case was set for the presentation of further evidence on June 1, 1982.

On May 14, the Master received a joint motion of the States to vacate the June 1 setting on the basis of a stipulation of agreement on specified matters. Paragraph I D 4 of the Stipulation said:

> "New Mexico and Texas recognize that this Stipulation does not prevent the Pecos River Commission from adopting new data, values or procedures or from changing the data, values or procedures agreed upon in this Stipulation."

The Master vacated the June 1 setting. The matter is before him on (1) the Texas motion to use the double mass method, and (2) the New Mexico motion for final decree and dismissal.

FACTUAL ISSUES

The Court approved definition of the 1947 condition must be translated into water quantities so that there is a numerical standard against which compliance can be effectually measured. Annual depletions must be determined and measured against that standard.

The first task includes a judgmental assignment of values to many variables incapable of measurement by accepted standards, such as flood inflows, channel losses, reservoir losses, consumption by phreatophytes, and returns from diversions. All of these items have been covered by conflicting testimony and exhibits.

The May 14, 1982, Stipulation relates to many fact issues and specifies disputes for resolution by the Master. See particularly Stipulation ¶ II(b). To generalize, the disputes relate to flood inflows, channel losses, and the inclusion of certain years in the establishment of the base relationship.

Various hydrological, mathematical, and statistical procedures may be used for computation of the unmeasured values. One method is the "water budget." To determine the estimated outflow of a river division, the calculated gains are added to the measured inflow and the calculated losses are subtracted from the result. Calculation of the gains and losses requires assumptions and equations. The result may be what is known as a residual negative, i.e., a minus flow which is impossible of occurrence in a state of nature. When a residual negative occurs, Texas would stop at zero and forget minus values. New Mexico would carry forward the minus numbers. See discussion in the 1979 Master's Report, p. 51. Another method is hydrograph scalping. Hydrographs, showing stream flow at upper and lower points as a function of time, are superimposed and a line drawn across them. The distances between the graphs at the points crossed by the line are intended to separate the base flow and the flood flow. The place and manner in which the line is drawn are matters of individual engineering judgment.

The engineering problems and differences are exemplified by the testimony of the experts. See e.g. Texas witness Bell, Tr. vols. VII through X; Texas witness Whitenton, Tr. vols. XXI, XL, XLI and XLII; Texas witness Martin, Tr. vols. XLI and XLII; New Mexico witness Slingerland, Tr. vols. XII through XV; New Mexico witness Flook, Tr. vols. XXXIX, XL, and XLIII. Examination of the exhibits discloses the number, variety, and complexity of the details which go to make up the problem. See e.g., Stip. Ex. 8; Texas Exhibits 6-8, 39, 41, 51, and 59; New Mexico Exhibits 10-40, 50, 54, 56, and 57. The significant differences between S.O. 1947 and RBD are shown by Texas Ex. 20 which compares annual averages for the 1919-1947 period. RBD shows flood inflow 4,000 acre feet less than S.O. 1947, channel loss 26,000 acre feet greater, and state line flow 44,000 acre feet less. These quantities are substantial for a small stream such as the Pecos.

Determination of the pertinent values, both measured and unmeasured, is just the beginning of a solution to the problem. The numbers must be converted into a base relationship to which annual flows may be compared for determination of departures. The States present different procedures to accomplish this task. Texas has rejected river routing and now relies on double mass analysis. New Mexico rejects double mass and insists on river routing.

A routing study superimposes a water supply on a condition of use. Erickson Tr. 894. Double mass analysis "is a cumulative plot of upstream inflow versus downstream outflow." Texas Ex. 41, p. 6. Each is essentially an accounting procedure usable in the administration of the inflow-outflow method. Each produces a curve intended to present graphically the 1947 condition. The S.O. 1947 curve appears at Plate 2, S.D. 109, p. 154; the RBD curve as Revised Plate 2, Stip. Ex. 5, p. 9; the double mass curve as Figures 18 and 19, Texas Ex. 41, pp. 39-40.

To prepare a curve, indicator points are plotted on a graph. See e.g. S.D. 109, pp. 151-152 and Plate 2 at p. 154. The points represent three-year progressive means. See Compact Art. VI (b). The river routing studies locate the curve in relation to the points by the least squares method. The double mass uses the theory of least absolute values for the same purpose.

Texas witness Charnes at Tr. 3662-3663 describes the difference between least squares and least absolute values and says the latter is "a more robust criterion." Despite Charnes' criticism of least squares, Texas witness Bell used least squares in preparing the double mass curves shown on Texas Exs. 7 and 8 and described his use of that method. Tr. 594-595. The use of either method requires complex equations. See e.g. Texas Ex. 41, App. 2, pp. 56-58.

After the values and the accounting procedures are determined a manual must be prepared to state with specificity how the base relationship is established and how the annual relationship must be determined. For such complex numerical requirements computer use is indicated. The

task of providing directions for programming a computer is for experts.

Texas asks the Court to resolve the disputes. Such Court action may be futile because Compact operation requires continuing administration to determine annual departures and that administration may be frustrated by the one-state veto. New Mexico says that the Court may not perform administrative duties and responsibilities delegated to the Commission and asks that the case be dismissed. Such action may leave Texas without a remedy and prolong the delay which is to the advantage of New Mexico. In the circumstances, the Master believes that a solution of the one-state veto problem should be made before undeterminable amounts of time and money are expended in consideration of the intricate and interrelated disputes.

LEGAL ISSUES

(a) General.

Art. III, § 2, cl. 2 of the United States Constitution gives the Supreme Court original jurisdiction over cases in which a State is a party. That jurisdiction has been used in controversies over the division of the use of interstate stream flows, and the principle of equitable apportionment has been established. See Kansas v. Colorado, 206 U.S. 46, 117 (1907); Wyoming v. Colorado, 259 U.S. 419, 464 (1922); Colorado v. Kansas, 320 U.S. 383, 385 (1943); and Nebraska v. Wyoming, 325 U.S. 589, 610-611 (1945).

Article I, §10, cl. 3 of the Constitution provides that no State shall enter into an agreement with another State without the consent of Congress. With the consent of Congress, the States have made many compacts, some of which concern the division of the use of interstate stream flows. Equitable apportionment may be made by either Court decision or interstate compact. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 104-106 (1938). Congressional consent "transforms an interstate compact . . . into a law of the United States." Cuyler v. Adams, 449 U.S. 433, 438, and see n. 7 at 438–439 (1981).

The Art. I, § 8, cl. 3, power of Congress to regulate commerce among the several States has no application to this case. The Compact apportions the "use" of the waters of the Pecos. A right to the use of flowing water is not ownership in the corpus of the water. A right of use is an alienable property right subject to acquisition by compliance with applicable state law. See Hutchins, Selected Problems in the Law of Water Rights in the West (1942). United States Department of Agriculture, Misc. Pub. No. 418, pp. 27-34. The equitable apportionment cases recognize that the right is that of use. Because a State has only the right to an equitable share of the water in a stream, no state proceeding can award a right of use in excess of the state's equitable share. Hinderlider v. La Plata, supra, 304 U.S. at 108-109.

Although water is an article of commerce, Sporhase v. Nebraska, __ U.S. __, 50 LW 5115 (1982), rights of use are in a different category. In Arizona v. California, 283 U.S. 423, 459 (1931), the Court said:

> "To appropriate water means to take and divert a specified quantity thereof and put it to beneficial use in accordance with the laws of the state where such water is found, and, by so doing, to acquire under such laws, a vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever, subject only to the right of prior appropriations."

Congress has consistently recognized state regulation of the rights to use water of streams which either flow interstate or are tributary to interstate streams. See Reclamation Act of 1902, 32 Stat. 388, and McCarran Amendment, 43 U.S.C. § 666. The Court has given similar recognition. See California v. United States, 438 U.S. 645 (1978); United States v. New Mexico, 438 U.S. 696 (1978); and Colorado River Water Conservation Board v. United States, 424 U.S. 800 (1976). The establishment of property rights in the use of water is a state function, which has not as yet been taken over by the federal government. The water rights derived under New Mexico law may not

exceed in toto the New Mexico share of Pecos water. Hinderlider v. La Plata, supra, 304 U.S. at 108.

Interstate water compacts recognize the need for continuing administration. Many provide no remedy for resolution of an impasse. Some provide that a federal representative shall have a vote. Others supply procedures for arbitration. For the information of the Court, the attached Appendix C notes the pertinent provisions of a number of interstate water compacts. The Master has found none which delineate the power of a court to break a compact created deadlock. Also, research disclosed no court decision bearing on the problem.

(b) Agency Impasse.

Texas does not seek review of agency action. Instead it asks the Court to act in place of the agency. The legal status of the agency deserves consideration.

The Cuyler v. Adams statement that a compact made with the consent of Congress is a law of the United States, 449 U.S. at 438, would seem to raise the possibility that the Commission is a federal agency. If it is, consideration should be given to the Administrative Procedures Act provision that a reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Such compulsion cannot be ordered here because only the States are parties to the suit. Neither the Commission nor its members were joined.

The Master has concluded that the Commission is not a federal agency. No state or federal intent to create a federal agency is shown. The use of interstate compacts is diminished if they create a federal administrative agency subject to all the ramifications of federal statutes and federal decisions delineating the scope of judicial review of administrative action. As said in California Tahoe Regional Planning Agency v. Jennings, 9 Cir., 594 F.2d 181, 190 (1979), cert. denied 444 U.S. 864, the consent of Congress "did not make applicable to the agreement the entire panoply of *federal* administrative and substantive standards." [Emphasis in original.]

Research has revealed but one case concerned with the failure of a compact-created agency to act. British Airways Board v. Port of Authority of New York and New Jersey, 2 Cir., 564 F.2d 1002 (1977). The operator of Concorde airliners sued to enjoin the Port Authority from preventing by inaction the use of international airports under its control by the Concorde. The court said, Id. at 1010: "The law simply will not tolerate the denial of rights by unwarranted official inaction." That case was not brought by a signatory to the compact but by an affected enterprise. Here we have an action by one signatory against the other.

Neither Texas nor New Mexico meets the impasse issue squarely.

(c) Breach of Contract.

Texas emphasizes that it sues to secure performance of the Compact, not to review Commission action. The Texas complaint alleges that New Mexico has breached the Compact in two ways: (1) failure to deliver in accordance with its Compact obligation, and (2) New Mexico through its Compact Commissioner has refused to apply Compact principles. See Complaint ¶ IV, V, and VI.

With regard to the second allegation, Texas assumes that the Compact principles are those for which it contends. The prolonged controversy shows that the Compact and its administration are controversial. The Court-approved definition of the 1947 condition rejected both the Texas and the New Mexico arguments for Compact interpretation. Nothing in the record shows that the New Mexico Commissioner was any more at fault than his Texas counterpart.

With regard to the first allegation, Texas assumes both the obligation and its violation. Until the obligation is determined violation may not be established. The obligation is still uncertain because the definition of the 1947 condition must be translated into water quantities to provide a numerical standard.

Green v. Biddle, 8 Wheat. (21 U.S.) 1, 92 (1823), says that "the terms compact and contract are synonymous." The Court has recognized that from a practical standpoint an interstate compact imposes a contractual obligation on each of the compacting states. See Dyer v. Sims, 341 U.S. 22, 28 (1951). Questions of obligation and breach are for determination by the Supreme Court. Id. and see Kentucky v. Indiana, 281 U.S. 163, 176 (1930). Neither State may decide these questions unilaterally. Hinderlider v. La Plata, supra, 304 U.S. at 110.

None of the Supreme Court decisions treating a compact as a contract has concerned apportionment of the use of interstate stream flow. The Pecos Compact must be viewed in the light of its intent to provide an equitable apportionment. A breach of contract case presents legal principles; an equitable apportionment case equitable principles. The instant case cannot be viewed as a simple contract action. The problem is what procedure is proper and desirable to achieve equitable apportionment.

(d) Continuation of the Suit.

As presently postured, continuance of the law suit will require:

(1) Determination of disputed issues pertaining to unmeasured values.

(2) Determination of disputed policy issues pertaining to accounting techniques.

(3) Preparation of a manual directing how the unmeasured values are to be determined and the techniques are to be used.

(4) Determination of the base relationship depicting the 1947 condition.

(5) Determination of the annual departures since 1961.

(6) Determination of whether any negative departures resulted from man's activities.

(7) Determination of what relief, if any, Texas may receive.

From his experience in this litigation, the Master estimates that 2-5 years will be required and the costs will be substantial.

The United States and the States seem to agree that continuation of the law suit is within the judicial function because the Compact grant of fact-finding power to the Commission does not preclude the judiciary from exercising similar power. The United States notes two exceptions: (1) the Art. VI(b) requirement that measurements shall be made on the basis of three-year periods; and (2) the Art. VI(c) provision that the inflow-outflow method shall be used unless otherwise directed by the Commission. See August, 1982 Memorandum of Solicitor General.

Texas and New Mexico say that if the case is to proceed, the next step should be the determination of the ¶ 4(b) issues. That paragraph presents eleven issues. They have never been resolved although the experts have testified at length and presented many exhibits.

On May 14, 1982, the States presented a Stipulation for approval by the Master. The Master has withheld approval because of his doubt as to the meaning of the Stipulation. Paragraph I B lists five documents. Paragraph I E reads:

> "With the modifications specified in IIA and with the qualifications, exceptions and restrictions specified in ID and IIB, New Mexico and Texas agree to the basic facts, unmeasured values and techniques set forth in the documents listed in IB."

Paragraph I D 4 says the States recognize the Commission power to adopt and change data, values, and procedures. The Stipulation is a mass of words and figures which challenge ingenuity but destroy clarity. Further proceedings in the case are adventures on uncharted hydrologic seas.

New Mexico continues to insist on the application of RBD. The Master rejected this argument in his 1979 Report, pp. 40–41, by concluding that RBD was approved and adopted only for the determination of state line departures for the 1952–1961 period and not for future periods. The

Commission, with unanimity, directed its engineers to proceed with the draft of a new inflow-outflow manual. The task was never completed. The Master adheres to his 1979 ruling.

Texas rejects river routing and insists on double mass analysis. That technique produces a straight-line relationship of outflow to inflow. Texas Ex. 41, Figure 17, p. 35. The Texas experts curved the line slightly "as requested by Texas Attorneys." Tr. 3685. The result appears as Figure 19, Texas Ex. 41, p. 41. The testimony and exhibits of witness Flook cover many objections to the use of double mass. See Tr. vol. XXXIX, pp. 36–59 and N. Mex. Ex. 50. The engineering advisors to the Compact negotiators noted in their Report, S.D. 109, pp. XXXIII–XXXIV:

> "A compact based on an allocation of water on a straight-line percentage basis is not feasible or practical. The flow of water at any point in a given stream, under natural conditions, does not bear a straight-line relation to the inflow to the stream above that point."

In the circumstances presented the Master is unwilling to substitute double mass analysis for river routing. The Master recognizes that the Commission, under the powers given by Art. VI, may do so.

Solution for the factual and policy disputes requires expertise in hydrology, statistics and mathematics. The Master does not have that expertise. He is not trained to scalp hydrographs, draw properly located graph curves, or program computers. His choice among competent and credible experts would be arbitration by instinct, not decision by law.

Continuation of the law suit will keep the lawyers and their experts busy and may accomplish nothing. The administration of any decree determining the disputes will require Commission action and invite a one-state veto. Past experience and the present attitudes of the States indicate the potential of a continuing impasse.

The existence of this potential means that a Court decree determining the many unknown variables and the specific

accounting techniques would be without binding effect and could be completely thwarted by the Commission. The decree would be advisory, not obligatory. The Court has repeatedly refused to enter advisory opinions. In FCC v. Pacifica Foundation, 438 U.S. 726, 734–735 (1978), the Court said: "However appropriate it may be for an administrative agency to write broadly in an adjudicatory proceeding, federal courts have never been empowered to issue advisory opinions." See Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240–241(1939): and Herby v. Pitcairn, 324 U.S. 117, 126 (1945).

(e) Judicial Solution of the Controversy

New Mexico contends that the action should be dismissed because the Court may not perform the responsibilities and exercise the powers delegated to the Commission. The Compact's requirement that the Commission evaluate stream flows and make findings as to depletion by man's activities, Art. V(4), (5), (6), and (12), and Art. VI(b) and (c), presents matters involving no specific legal principles. In the ordinary context of judicial review of agency action, courts determine whether there is law to apply, a question of law, and whether particular activities transcend allowable discretion, also a question of law. The Pecos Commission has taken no action and exercised no discretion. There is nothing to review. The Court is asked to take the actions which the Commission has not. To sustain that request the States have produced a record of expert testimony and exhibits Choice must be made between conflicting and rationally supported opinions of competent and credible experts. That choice should be made in the first instance by the administrative agency and then be subjected to judicial review.

The Court has said that it cannot "exercise or participate in the exercise of functions which are essentially legislative or administrative." Federal Radio Commission v. General Electric Company, 281 U.S. 464, 469 (1930). The Court cannot establish administrative procedures de novo,

Federal Communications Commission v. Schreiber, 381 U.S. 279, 290–291 (1965); modify the terms of an agency-issued license, Federal Power Commission v. Idaho Power Company, 344 U.S. 17, 20–21 (1952); or prescribe rates, Central Kentucky Natural Gas Company v. Railroad Commission, 290 U.S. 264, 271 (1933).

In original jurisdiction interstate controversies, the Supreme Court is the fact finder. It accepts or rejects recommendations of an appointed Master. In Ohio v. Wyandotte Chemicals Corp., a pollution case, 401 U.S. 493, 504 (1971), the Court said:

> "Indeed, Ohio is raising factual questions that are essentially ones of first impression to the scientists. The notion that appellate judges, even with the assistance of a most competent Special Master, might appropriately undertake at this time to unravel these complexities is, to say the least, unrealistic."

In Vermont v. New York, 417 U.S. 270, 277 (1974), the Court declined to act in "an arbitral rather than a judicial manner," and said that its original jurisdiction extended "to the adjudication of controversies between States according to principles of law."

In Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 558 (1978), the Court commented that administrative decisions should be set aside "only for substantial procedural or substantive reasons as mandated by statute." A corollary is that the Court may not make policy decisions which have been delegated to an administrative agency.

The Master doubts whether the judicial power extends to the exercise of the administrative functions at issue here. Even if it does have the power, the impasse problem persists. Paragraph I D 4 of the States' May 14, 1982, Stipulation recognizes that the Stipulation does not prevent the Commission from adopting or changing the data, values, and procedures stipulated. Such change would require unanimous action. At the same time any administration pursuant to a court-entered decree requires unanimity in

determining water quantities, changes in depletion, and causes of changes. Any lack of unanimity in making the detail findings needed to determine the mentioned major findings would cause a breakdown of administration and result in prolonging the impasse which has existed for over 20 years.

The history of the controversy, and the record in the suit, shows no hope for the elimination of the impasse by agreement. Compact, Art. XIV, provides that the Compact "may be terminated at any time by appropriate action of the legislatures of both of the signatory states." Here again unanimity is required but unlikely. Congressional withdrawal of consent might produce legal as well as political problems. Any effort by Congress to regulate the use of water of interstate streams has not occurred and would present many legal and political complications. Judicial action seems to present the only avenue for solution.

The Court might declare the Compact invalid because of a vitiating infirmity, impossibility of performance. See Hinderlider v. La Plata, supra, 304 U.S. at 108-109. If this were done, the only remedy available to Texas would be an original jurisdiction, equitable apportionment case. Such a suit would present equitable factors which "must be weighed as of the date when the controversy is mooted." Colorado v. Kansas, 320 U.S. at 393-394. Interstate equitable apportionment cases have a history of perplexing factual complexity and long life. For example, the Laramie River litigation began in 1911 and was concluded in 1957. See Wyoming v. Colorado, 259 U.S. 419, 286 U.S. 494, 298 U.S. 573, 309 U.S. 572, and 353 U.S. 953.

This is not a case like Green v. Biddle and others where one State has acted unilaterally in violation of an interstate compact. See, e.g. Green v. Biddle, 8 Wheat. (21 U.S.) 1, and Dyer v. Sims, 341 U.S. 22, where one signatory state breached a compact. Here, each State, by the exercise of the veto power, has contributed to the frustration of the Compact purpose of equitable apportionment. See the New Mexico 1978 Statement on Pecos River Administrative History, pp. 27-30. A February 17, 1977,

Commission meeting lasted 18 minutes with unanimity only on a motion to adjourn. See Master's 1977 Report on the New Mexico Affirmative Defenses, pp. 32-34. The long continuing, recalcitrant, intransigent, and uncompromising attitudes of the States negate any hope of unanimity.

The Master believes that the equity power of the Court sufices to provide a judicial solution for the impasse. In private litigation the Court has said:

> "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case."

Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944). See also Weinberger v. Romero-Barcelo, __ U.S. __, 102 S. Ct. 1798, 1802–1803 (1982). The same principle may well be applied in litigation between States.

When a deadlock occurs in private affairs, a recognized solution has been the court appointment of a receiver. The application of such a remedy to governmental affairs would seem to be beyond the judicial function. The Court might appoint a water master to administer the stream but it has twice refused to do so. See Vermont v. New York, 417 U.S. 270, 274–275 (1974); and Wyoming v. Colorado, 298 U.S. 573, 586 (1936).

In the Colorado River litigation, Arizona v. California, 373 U.S. 546 (1963), the Court found congressional intent in the 1928 Boulder Canyon Project Act, 45 Stat. 1057, to charge the Secretary of the Interior with authority and responsibility to manage the Lower Colorado River, though that Act contained only minimal standards. Although we have here no explicit grant of authority, the varying approaches to the built-in possibility of impasse in compacts between or among states, see Appendix C, furnish a basis for inferring that the parties contracted with full knowledge that disputes under the compacts can only be finally resolved by resort to the Court's original jurisdiction. This in turn supplies a basis for judicial action predicated on having on-going stream administration involving technical

and engineering judgments determined in the first instance by the administrative agency, even though it be necessary to augment that agency by a judicially-added provision for a tie-breaking vote.

Progress must be made toward the solution of this prolonged controversy over the apportionment of the Pecos River stream flows; continued deadlock favors New Mexico, the upstream state. The Master concludes that the impasse can best be resolved by provision for third-party participation in deadlocked Commission deliberations.

A tie-breaker can be selected in several ways. The preferable solution would be agreement between the States on a procedure to break the impasse and their selection of an individual or individuals empowered to act when the States disagree. The long history of this controversy and the attitude of the States in this litigation present little hope of agreement. Perhaps, compulsion by a Court order might be effective.

The Master believes that the equity powers of the Court are adequate to provide a remedy. If within a reasonable time, say ninety days, the States do not agree on a tie-breaking procedure, the Court would be justified in ordering, on an interim or *pendente lite* basis, that either the representative of the United States, or some other third-party, be designated and empowered to participate in all Commission deliberations and act decisively when the States are not in agreement. The order should provide that the decision of the tie-breaker is final, subject only to appropriate review by the Court. Upon the selection of a tie-breaker, the States should be ordered to return to the Commission for determination of this long-standing controversy. Without provision for a tie-breaker, any order for return to the Commission will be futile.

CONCLUSIONS OF MASTER

For the reasons stated herein, the Master concludes: (1) the New Mexico motion to dismiss the action should be denied; and (2) the Texas motion to substitute double mass

analysis for river routing should be denied without prejudice to consideration by the Commission.

The Master also concludes that further progress in this case will require him, and later the Court, to perform administrative duties and exercise administrative powers delegated to the agency created by the Compact. The Master believes that such exercise of administrative power is beyond the judicial function.

Absent agreement and cooperation by the States, the disputes which have long separated them should be resolved by the administrative agency created by the Compact. A return to the Commission will serve no useful purpose unless the impasse problem is solved. The solution of that problem is significant not only to this case but to the many other interstate water compacts which require unanimity in stream flow administration. In the absence of a definitive Court decision, the Master has concluded that the impasse can be cured by the participation of a third-party in Compact deliberations when the States are in disagreement. No other method has been suggested by any party to this suit. In the opinion of the Master the equity powers of the Court permit its designation of such a tie-breaker.

Any Court decree should recognize the right to apply for amendment or further relief. See, e.g., the language of the North Platte decree, Nebraska v. Wyoming, 325 U.S. at 671:

> "Any of the parties may apply at the foot of this decree for its amendment or further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy."

In the North Platte case, the Court granted the request of the parties for the entry of a supplemental decree. See Nebraska v. Wyoming, 345 U.S. 981 (1953).

The alternative to the recommendations of the Master is the continuance of the suit as presently postured. If that is done, the time and money required are each conjectural.

Denver, Colorado, September 10, 1982.

Jean S. Breitenstein
Special Master

C–446 U.S. Courthouse
1929 Stout St.
Denver, Colorado 80294

APPENDIX A
GLOSSARY

1 – A.F. or af:	Acre Foot or acre feet. A measurement of water quantity. One acre foot is the quantity of water and would cover one acre to a depth of one foot.
2 – Agency:	The Pecos River Commission.
3 – Alamagordo:	The designation of the gage used to determine stream flows into the middle area. In the record this gage is sometimes also referred to as Guadalupe and as Sumner.
4 – Angeles:	See State line.
5 – C.F.S. or cfs:	One cubic foot per second. A measurement of water flow. One second foot of water flowing for 24 hours produces 1.983 acre feet.
6 – Channel Losses:	Unmeasured depletions of Pecos flows resulting from evaporation, bank storage, disappearance into the subsurface, and consumption by natural vegetation, principally phreatophytes.
7 – Commission:	See Pecos River Commission.
8 – Compact:	See Pecos River Compact.
9 – Double Mass Analysis:	A method of analyzing stream flows by a cumulative plot of upstream inflow versus downstream outflow.
10 – Flood inflows or Flood Flows:	Unmeasured accretions to the Pecos River resulting from unusual precipitation.
11 – Guadalupe:	See Alamagordo.
12 – Hydrograph:	A graph representing flow or other property of water as a function of time.
13 – Inflow-Outflow Manual:	A handbook prescribing how the inflow-outflow method be applied to practical use.

14 – Inflow-Outflow Method:	A procedure for determining the water delivery of an upper state to a lower state.
15 – Master's 1979 Report:	His Report to the Court on the New Mexico delivery obligation.
16 – 1947 Condition:	The Compact standard for determination of the New Mexico delivery obligation.
17 – Pecos River Commission:	The administrative agency created by the Compact for its administration. The Commission is composed of one representative each for the United States, Texas, and New Mexico with the United States representative having no right to vote.
18 – Pecos River Compact:	The Compact made by Texas and New Mexico to apportion Pecos River water. The Compact became effective by the 1949 grant of congressional consent. See 63 Stat. 159.
19 – Pecos River Compact Commission:	The body which negotiated the Compact. It was composed of one voting representative each of the United States, Texas, and New Mexico.
20 – Phreatophytes:	See channel losses.
21 – RBD – Review of Basic Data:	A river routing study presented by engineers to the Commission and used by it in a limited fashion. Details of the study are found in Appendix B to the Master's 1979 Report.
22 – Red Bluff:	See state line.
23 – River Routing Study:	An analysis of the quantity and availability of stream flows under various conditions both actual and assumed.

24 - S.D. 109: Senate Document 109, 81st Cong. 1st Sess. A report to the United States Senate by the Chairman of the Senate Committee on Interior and Insular Affairs when the bill for the grant of consent to the Compact was before Congress.

25 - S.O. 1947: Summary of Operations 1947, a river routing study presented to the Compact negotiators by their engineers. The details of the study are found in Appendix A to the Master's 1979 Report.

26 - State Line: The point where the Pecos crosses the boundary between New Mexico and Texas. This point is sometimes referred to as Angeles or Red Bluff. The Pecos flow, plus the Delaware flow, into Red Bluff Reservoir equals the state line flow.

27 - Summary of Operations 1947: See S.O. 1947.

28 - Sumner: See Alamagordo.

29 - USGS: United States Geological Survey

APPENDIX B

PECOS RIVER COMPACT
(63 Stat. 159, 160–165)

The State of New Mexico and the State of Texas, acting through their Commissioners, John H. Bliss for the State of New Mexico and Charles H. Miller for the State of Texas, after negotiations participated in by Berkeley Johnson, appointed by the President as the representative of the United States of America, have agreed respecting the uses, apportionment and deliveries of the water of the Pecos River as follows:

ARTICLE I

The major purposes of this Compact are to provide for the equitable division and apportionment of the use of the waters of the Pecos River; to promote interstate comity; to remove causes of present and future controversies; to make secure and protect present development within the states; to facilitate the construction of works for, (a) the salvage of water, (b) the more efficient use of water, and (c) the protection of life and property from floods.

ARTICLE II

As used in this Compact:

(a) The term "Pecos River" means the tributary of the Rio Grande which rises in north-central New Mexico and flows in a southerly direction through New Mexico and Texas and joins the Rio Grande near the town of Langtry, Texas, and includes all tributaries of said Pecos River.

(b) The term "Pecos River Basin" means all of the contributing drainage area of the Pecos River and its tributaries above its mouth near Langtry, Texas.

(c) "New Mexico" and "Texas" mean the State of New Mexico and the State of Texas, respectively; "United States" means the United States of America.

(d) The term "Commission" means the agency created by this Compact for the Administration thereof.

(e) The term "deplete by man's activities" means to diminish the stream flow of the Pecos River at any given point as the result of beneficial consumptive uses of water within the Pecos River Basin above such point. For the purposes of this Compact it does not include the diminution of such flow by encroachment of salt cedars or other like growth, or by deterioration of the channel of the stream.

(f) The term "Report of the Engineering Advisory Committee" means that certain report of the Engineering Advisory Committee dated January, 1948, and all appendices thereto; including, basic data, processes, and analyses utilized in preparing that report, all of which were reviewed, approved, and adopted by the Commissioners signing this Compact at a meeting held in Santa Fe, New Mexico, on December 3, 1948, and which are included in the Minutes of that meeting.

(g) The term "1947 condition" means that situation in the Pecos River Basin as described and defined in the Report of the Engineering Advisory Committee. In determining any question of fact hereafter arising as to such situation, reference shall be made to, and decisions shall be based on, such report.

(h) The term "water salvaged" means that quantity of water which may be recovered and made available for beneficial use and which quantity of water under the 1947 condition was non-beneficially consumed by natural processes.

(i) The term "unappropriated flood waters" means water originating in the Pecos River Basin above Red Bluff Dam in Texas, the impoundment of which will not deplete the water usable by the storage and diversion facilities existing in either state under the 1947 condition and which if not impounded will flow past Girvin, Texas.

ARTICLE III

(a) Except as stated in paragraph (f) of this Article, New Mexico shall not deplete by man's activities the flow of the Pecos River at the New Mexico-Texas state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition.

(b) Except as to the unappropriated flood waters thereof, the apportionment of which is included in and provided for by paragraph (f) of this Article, the beneficial consumptive use of the waters of the Delaware River is hereby apportioned to Texas, and the quantity of such beneficial consumptive use shall be included in determining waters received under the provisions of paragraph (a) of this Article.

(c) The beneficial consumptive use of water salvaged in New Mexico through the construction and operation of a project or projects by the United States or by joint undertakings of Texas and New Mexico, is hereby apportioned forty-three per cent (43%) to Texas and fifty-seven per cent (57%) to New Mexico.

(d) Except as to water salvaged, apportioned in paragraph (c) of this Article, the beneficial consumptive use of water which shall be non-beneficially consumed, and which is recovered, is hereby apportioned to New Mexico but not to have the effect of diminishing the quantity of water available to Texas under the 1947 condition.

(e) Any water salvaged in Texas is hereby apportioned to Texas.

(f) Beneficial consumptive use of unappropriated flood waters is hereby apportioned fifty per cent (50%) to Texas and fifty per cent (50%) to New Mexico.

ARTICLE IV

(a) New Mexico and Texas shall cooperate to support legislation for the authorization and construction of projects to eliminate non-beneficial consumption of water.

(b) New Mexico and Texas shall cooperate with agencies of the United States to devise and effectuate means of alleviating the salinity conditions of the Pecos River.

(c) New Mexico and Texas each may:

(i) Construct additional reservoir capacity to replace reservoir capacity made unusable by any cause.

(ii) Construct additional reservoir capacity for the utilization of water salvaged and unappropriated flood waters apportioned by this Company [sic] to such state.

(iii) Construct additional reservoir capacity for the purpose of making more efficient use of water apportioned by this Compact to such state.

(d) Neither New Mexico nor Texas will oppose the construction of any facilities permitted by this Compact, and New Mexico and Texas will cooperate to obtain the construction of facilities that will be of joint benefit to the two states.

(e) The Commission may determine the conditions under which Texas may store water in works constructed in and operated by New Mexico.

(f) No reservoir shall be constructed and operated in New Mexico above Avalon Dam for the sole benefit of Texas unless the Commission shall so determine.

(g) New Mexico and Texas each has the right to construct and operate works for the purpose of preventing flood damage.

(h) All facilities shall be operated in such manner as to carry out the terms of this Compact.

ARTICLE V

(a) There is hereby created an interstate administrative agency to be known as the "Pecos River Commission." The Commission shall be composed of one Commissioner representing each of the states of New Mexico and Texas, designated or appointed in accordance with the laws of each such state, and, if designated by the President, one Commissioner representing the United States. The President

is hereby requested to designate such a Commissioner. If so designated, the Commissioner representing the United States shall be the presiding officer of the Commission, but shall not have the right to vote in any of the deliberations of the Commission. All members of the Commission must be present to constitute a quorum.

(b) The salaries and personal expenses of each Commissioner shall be paid by the government which he represents. All other expenses which are incurred by the Commission incident to the administration of this Compact and which are not paid by the United States shall be borne equally by the two states. On or before November 1 of each even numbered year the Commission shall adopt and transmit to the Governors of the two states and to the President a budget covering an estimate of its expenses for the following two years. The payment of the expenses of the Commission and of its employees shall not be subject to the audit and accounting procedures of either of the two states. However, all receipts and disbursements of funds handled by the Commission shall be audited yearly by a qualified independent public accountant and the report of the audit shall be included in, and become a part of, the annual report of the Commission.

(c) The Commission may appoint a secretary who, while so acting, shall not be an employee of either state. He shall serve for such term, receive such salary, and perform such duties as the Commission may direct. The Commission may employ such engineering, legal, clerical, and other personnel as in its judgment may be necessary for the performance of its functions under this Compact. In the hiring of employees the Commission shall not be bound by the civil service laws of either state.

(d) The Commission, so far as consistent with this Compact, shall have power to:

1. Adopt rules and regulations;

2. Locate, establish, construct, operate, maintain, and abandon watergaging stations, independently or in cooperation with appropriate governmental agencies;

3. Engage in studies of water supplies of the Pecos River and its tributaries, independently or in cooperation with appropriate governmental agencies;

4. Collect, analyze, correlate, preserve and report on data as to the stream flows, storage, diversions, salvage, and use of the waters of the Pecos River and its tributaries, independently or in cooperation with appropriate governmental agencies;

5. Make findings as to any change in depletion by man's activities in New Mexico, and on the Delaware River in Texas;

6. Make findings as to the deliveries of water at the New Mexico-Texas state line;

7. Make findings as to the quantities of water salvaged and the amount thereof delivered at the New Mexico-Texas state line;

8. Make findings as to quantities of water non-beneficially consumed in New Mexico;

9. Make findings as to quantities of unappropriated flood waters;

10. Make findings as to the quantities of reservoir losses from reservoirs constructed in New Mexico which may be used for the benefit of both states, and as to the share thereof charged under Article VI hereof to each of the states;

11. Acquire and hold such personal and real property as may be necessary for the performance of its duties hereunder and to dispose of the same when no longer required;

12. Perform all functions required of it by this Compact and do all things necessary, proper or convenient in the performance of its duties hereunder, independently or in cooperation with appropriate governmental agencies;

13. Make and transmit annually to the Governors of the signatory states and to the President of the United States on or before the last day of February of each year, a report covering the activities of the Commission for the preceding year.

(e) The Commission shall make available to the Governor of each of the signatory states any information within its possession at any time, and shall always provide free access to its records by the Governors of each of the states, or their representatives, or authorized representatives of the United States.

(f) Findings of fact made by the Commission shall not be conclusive in any court, or before any agency or tribunal, but shall constitute prima facie evidence of the facts found.

(g) The organization meeting of the Commission shall be held within four months from the effective date of this Compact.

ARTICLE VI

The following principles shall govern in regard to the apportionment made by Article III of this Compact:

(a) The Report of the Engineering Advisory Committee, supplemented by additional data hereafter accumulated, shall be used by the Commission in making administrative determinations.

(b) Unless otherwise determined by the Commission, depletions by man's activities, state-line flows, quantities of water salvaged, and quantities of unappropriated flood waters shall be determined on the basis of three-year periods reckoned in continuing progressive series beginning with the first day of January next succeeding the ratification of this Compact.

(c) Unless and until a more feasible method is devised and adopted by the Commission the inflow-outflow method, as described in the Report of the Engineering Advisory Committee, shall be used to:

(i) Determine the effect on the state-line flow of any change in depletions by man's activities or otherwise, of the waters of the Pecos River in New Mexico.

(ii) Measure at or near the Avalon Dam in New Mexico the quantities of water salvaged.

(iii) Measure at or near the state line any water released from storage for the benefit of Texas as provided for in subparagraph (d) of this Article.

(iv) Measure the quantities of unappropriated flood waters apportioned to Texas which have not been stored and regulated by reservoirs in New Mexico.

(v) Measure any other quantities of water required to be measured under the terms of this Compact which are susceptible of being measured by the inflow-outflow method.

(d) If unappropriated flood waters apportioned to Texas are stored in facilities constructed in New Mexico, the following principles shall apply:

(i) In case of spill from a reservoir constructed in and operated by New Mexico, the water stored to the credit of Texas will be considered as the first water to spill.

(ii) In case of spill from a reservoir jointly constructed and operated, the water stored to the credit of either state shall not be affected.

(iii) Reservoir losses shall be charged to each state in proportion to the quantity of water belonging to that state in storage at the time the losses occur.

(iv) The water impounded to the credit of Texas shall be released by New Mexico on the demand of Texas.

(e) Water salvaged shall be measured at or near the Avalon Dam in New Mexico and to the quantity thereof shall be added a quantity equal to the quantity of salvaged water depleted by man's activities above Avalon Dam. The quantity of water salvaged that is apportioned to Texas shall be delivered by New Mexico at the New Mexico-Texas state line. The quantity of unappropriated flood waters impounded under paragraph (d) of this Article, when released shall be delivered by New Mexico at the New Mexico-Texas state line in the quantity released less channel losses. The unappropriated flood waters apportioned to Texas by this Compact that are not impounded in reservoirs in New Mexico shall be measured and delivered at the New Mexico-Texas state line.

(f) Beneficial use shall be the basis, the measure, and the limit of the right to use water.

ARTICLE VII

In the event of importation of water by man's activities to the Pecos River Basin from any other river basin the state making the importation shall have the exclusive use of such imported water.

ARTICLE VIII

The provisions of this Compact shall not apply to, or interfere with, the right or power of either signatory state to regulate within its boundaries the appropriation, use and control of water, not inconsistent with its obligations under this Compact.

ARTICLE IX

In maintaining the flows at the New Mexico-Texas state line required by this Compact, New Mexico shall in all instances apply the principle of prior appropriation within New Mexico.

ARTICLE X

The failure of either state to use the water, or any part thereof, the use of which is apportioned to it under the terms of this Compact, shall not constitute a relinquishment of the right to such use, nor shall it constitute a forfeiture or abandonment of the right to such use.

ARTICLE XI

Nothing in this Compact shall be construed as;

(a) Affecting the obligations of the United States under the Treaty with the United Mexican States (Treaty Series 994);

(b) Affecting any rights or powers of the United States, its agencies or instrumentalities, in or to the waters of the

Pecos River, or its capacity to acquire rights in and to the use of said waters;

(c) Subjecting any property of the United States, its agencies or instrumentalities, to taxation by any state or subdivision thereof, or creating any obligation on the part of the United States, its agencies or instrumentalities, by reason of the acquisition, construction or operation of any property or works of whatever kind, to make any payment to any state or political subdivision thereof, state agency, municipality or entity whatsoever, in reimbursement for the loss of taxes;

(d) Subjecting any property of the United States, its agencies or instrumentalities, to the laws of any state to an extent other than the extent to which such laws would apply without regard to this Compact.

ARTICLE XII

The consumptive use of water by the United States or any of its agencies, instrumentalities or wards, shall be charged as a use by the state in which the use is made; provided, that such consumptive use incident to the diversion, impounding, or conveyance of water in one state for use in the other state shall be charged to such latter state.

ARTICLE XIII

This Compact shall not be construed as establishing any general principle or precedent applicable to other interstate streams.

ARTICLE XIV

This Compact may be terminated at any time by appropriate action of the legislatures of both of the signatory states. In the event of such termination, all rights established under it shall continue unimpaired.

ARTICLE XV

This Compact shall become binding and obligatory when it shall have been ratified by the legislature of each State

and approved by the Congress of the United States. Notice of ratification by the legislature of each State shall be given by the Governor of that State to the Governor of the other State and to the President of the United States, and the President is hereby requested to give notice to the Governor of each State of approval by the Congress of the United States.

IN WITNESS WHEREOF, the Commissioners have executed three counterparts hereof each of which shall be and constitute an original, one of which shall be deposited in the archives of the Department of State of the United States, and one of which shall be forwarded to the Governor of each State.

Done at the City of Santa Fe, State of New Mexico, this 3rd day of December, 1948.

APPENDIX C

INTERSTATE COMPACT PROVISIONS FOR ADMINISTRATION

Difficulties of administration and possibilities of impasse have been recognized in some, but not all, interstate water compacts. For a general discussion of the problem see Witmer, Documents on the Use and Control of Interstate and International Streams (1968), House Document No. 319, 90th Cong. 2d Sess. 2d edition.

A number of compacts leave administration to the appropriate state officials of the signatory States. See:

La Plata, 43 Stat. 796;

South Platte, 44 Stat. 19;

Republican, 57 Stat. 86;

Belle Fourche, 58 Stat. 94;

Snake River, 64 Stat. 29;

Upper Niobrara, 83 Stat. 86.

The Rio Grande Compact of Colorado, New Mexico, and Texas, 53 Stat. 785, created a Commission with a nonvoting representative of the United States. The Compact specifically recognizes recourse to the United States Supreme Court for resolution of future disputes over the character and quality of water.

The first Compact to provide internally for resolution of an impasse was the Arkansas River Compact between Colorado and Kansas, 63 Stat. 145. It provides for arbitration, upon the request of the two signatory States, by the United States representative, or other arbitrator. No provision is made for dispute resolution when approval of arbitration is withheld.

The Upper Colorado River Basin Compact, 63 Stat. 31, a five-State compact, gives the federal representative one vote, out of a total of six votes, but requires four votes for action.

In the Yellowstone River Compact, 65 Stat. 663, the federal representative has a tie-breaking vote in a controversy between Wyoming and Montana, two of the three signatory States.

Of purely historical interest, a compact negotiated by Idaho and Wyoming, but never ratified, provided procedurally complex terms for resolution of an impasse. See Witmer, supra, p. 315.

The Sabine River Compact, 68 Stat. 690, provides that in case of a tie vote, arbitration may be had on request of either State.

The Klamath River Compact, 71 Stat. 497, provides for arbitration in the event of an impasse.

The Arkansas-Oklahoma Arkansas River Compact, 87 Stat. 569, provides for, but does not require, arbitration in event of an impasse.

The four-State Red River Compact, 94 Stat. 3305, provides for two commissioners from each State with six concurring votes needed for action, except that when the proposed action affects water rights in a signatory State, eight concurring votes are required.

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No. 65, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF TEXAS,
Plaintiff

v.

STATE OF NEW MEXICO,
Defendant

UNITED STATES OF AMERICA,
Intervenor

NEW MEXICO'S EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER AND BRIEF IN SUPPORT OF EXCEPTIONS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 65, Original

STATE OF TEXAS,

Plaintiff

v.

STATE OF NEW MEXICO,

Defendant

UNITED STATES OF AMERICA,

Intervenor

EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

The State of New Mexico objects to the Report and Recommendations of the Special Master, accepted for filing October 18, 1982.

1. New Mexico objects to the Master's recommendation (at 2-3) that the Court vest in the United States representative to the Pecos River Commission, or in a third party, the power to vote as a tie breaker on the Commission, because that recommendation, which is comparable to the appointment of an arbiter, would have the Court rewriting the Compact. The compacting states, with congressional approval, established the voting power on the Commission in Article V of the Pecos River Compact. Judicial rewriting of the voting provisions in the

Compact would be an unauthorized intrusion on the legislative power and on the agreement between the sovereign states.

2. New Mexico objects to the Master's action vacating Paragraph 4(b) of the Pre-Trial Order (see pp. 10-11 of Master's Report and Recommendations) because the Master, in so doing, prematurely eliminated from the case the justiciable issues concerning the Commission's findings of fact. The Pecos River Commissioners unanimously made findings of fact in 1962. In filing this lawsuit, Texas repudiated the findings. Paragraph 4(b) of the Pre-Trial Order specified the issues Texas raised in challenging the basis of the findings. Texas still contests the validity of the Commission's findings of fact and their basis. The Master, therefore, erred in deciding to end his review of the findings the Commission had made.

3. New Mexico, in the alternative, objects to the Master's recommendation (at 2) that the Court deny New Mexico's motion to dismiss. After the Master vacated Paragraph 4(b) of the Pre-Trial Order, New Mexico moved to dismiss the case because there was nothing left for the Court to review. The Master, having eliminated judicial review of the Commission's findings of fact from the case, could not go on to make findings of fact for the Commission because he would be exceeding the judicial power under Article III of the U.S. Constitution. The Master agreed (at 22-23) but nevertheless recommends denial of the motion to dismiss. The Court may not, however, retain the case if it has no further judicial function.

New Mexico thus urges the Court to reject the Master's recommendation to give a third party voting power on the Pecos River Commission. New Mexico further asks that the Court return the case to the Master with direction to complete the judicial review of the findings of fact that the Pecos River

Commission made. In the alternative, New Mexico urges the Court to dismiss the case and to allow the matter to return to the Commission.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1982

No. 65, Original

STATE OF TEXAS,

Plaintiff

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STATE OF NEW MEXICO,

Defendant

UNITED STATES OF AMERICA,

Intervenor

BRIEF IN SUPPORT OF EXCEPTIONS

QUESTIONS PRESENTED

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1. Whether the Court may rewrite the voting provisions of Article V of the Pecos River Compact to provide for a tie-breaker, thus diluting the voting strength of the party states, eliminating the Compact's requirement of unanimity and foreclosing the right of each state to veto Commission action.

2. Whether the Court should review findings of fact the Commission made in 1962 where Texas, the plaintiff, disputes their validity and the validity of the Review of Basic Data on which they are based.

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JURISDICTION

The original jurisdiction of the Court was invoked under Art. III, Section 2, Clause 2 of the Constitution of the United States and 28 U.S.C. §1251(a).

STATUTE INVOLVED

The Pecos River Compact, 63 Stat. 159 (1949), §72-15-19 N.M.S.A. 1978, and Tex. Water Code Ann. tit. 3, §43.010 (Vernon 1972). A copy of the Pecos River Compact appears in the Appendix to this brief.

STATEMENT OF THE CASE

A. The First Twenty-Five Years of Compact Administration

The Pecos River rises in New Mexico, flows into Texas and joins the Rio Grande. Although it is a small river, "it has all of the problems that any big river ever had and has some problems peculiar unto itself."[1] The Pecos River is continually changing. S. Doc. No. 109 at xxv.[2] The flow of the water at any particular point in the river does not bear a straight-line relation to the inflow or depletions of water in the river above that point. S. Doc. No. 109 at xxxiii-iv. As the Master here noted, "the inconstancy of rainfall and the geologic conditions of the Pecos

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[1] Hearing on S. J. Res. 155 Before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs, 84th Cong., 2d Sess. 8 (1956). *See also* S. Doc. No. 109, 81st Cong., 1st Sess. 2 (1949); S. Rep. No. 192, 85th Cong., 1st Sess. 4 (1957).

[2] "S. Doc. No. 109" refers to the Senate document published in 1949, 81st Congress, 1st Session, and containing the Pecos River Compact together with the Report of the Engineering Advisory Committee to the Pecos River Compact Commission. "Stip. Ex." refers to Stipulated Exhibit. "Tr." refers to the transcript of the proceedings before the Master. The number preceding the "Tr." is the volume; the number following it is the page.

Basin present unique complications. . . . 'In fact, in the absence of flood inflows, the normal basic flow is entirely lost and reestablished many times in the length of the stream.' "[3] The engineering advisory committee told the Pecos River Commission in November 1948 before ratification of the Compact: "This committee does not know what the ordinary flow of the Pecos River is. . . ." S. Doc. No. 109 at 85.

Besides the inconstancy of the ordinary flow, the Pecos River suffers frequent and destructive floods which ruin the channels and fill the reservoirs with silt. The river suffers recurring drought. Water loving plants grow rapidly along the river and consume unusually large amounts of water. In addition, water quality is poor. *E.g.*, Report of Special Master on Obligation of New Mexico to Texas Under the Pecos River Compact at 5-6 (filed Oct. 15, 1979), *aff'd*, 446 U.S. 540 (1980); Hearing on S. J. Res. 155, *supra* note 2 at 8; S. Doc. No. 109 at 2; S. Rep. No. 192, *supra* note 2 at 4.

Because the river is so difficult, the Pecos River Compact is complex; it requires detailed and continuous administration. The Pecos River Compact apportions Pecos River water between Texas and New Mexico and gives the states a way to work together to solve some of the river's problems. Because allocation of Pecos River water on a straight-line percentage basis was neither practical nor feasible, *e.g.*, S. Doc. No. 109 xxxiii, the parties agreed to divide the waters on the basis of the "1947 condition" and to administer the agreement by means of a detailed inflow-outflow accounting method. Pecos River Compact, Articles II, III, VI. The Compact established the Pecos River Commission and directed it to administer the apportionment of water under the Compact and to collect data

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[3]Report and Recommendations at 6 (filed Oct. 18, 1982), quoting in part from Stip. Ex. 11(b) at 12 (1942 Report of the National Resources Planning Board) (emphasis omitted).

and conduct wide-ranging studies of the Pecos River. Article V. The Compact also committed the states to act jointly to salvage water and improve water quality. Article IV.

After the Pecos River Compact was approved in 1948 and enacted into law in 1949, the Pecos River Commission began promptly to analyze and administer the river. The Commissioners agreed upon and established gaging stations. They authorized aerial photography for mapping. They undertook a study of groundwater movement in the area. They investigated the possibility of stopping the brine inflow in the Malaga Bend area. They examined the salt cedar problem in the McMillan delta and in the Acme to Artesia reach of the Pecos River, and obtained congressional authorization for channelization works on the Pecos River. *E.g.*, Stip. Ex. 4 at 21-24, 29, 42-44, 49, 60-62, 83-84 (Commission meetings, Jan. 19, 1950, Aug. 14, 1950, May 17, 1951, Jan. 17, 1952, Jan. 22, 1953, May 12, 1954).

Commission efforts to administer the apportionment of water under Article III(a) of the Pecos River Compact, on the other hand, were stymied at the outset because of mistakes, omissions and inconsistencies in the 1947 routing study and the accompanying inflow-outflow manual that had been developed to guide administration of the Compact. Report of Special Master on Obligation of New Mexico to Texas Under the Pecos River Compact at 16 (filed Oct. 15, 1979), *aff'd*, 446 U.S. 540 (1980); Master's Report and Recommendations at 6 (filed Oct. 18, 1982). *See also* Stip. Ex. 4 at 7-8 (Commission meeting, Dec. 9 & 10, 1949). As John Erickson, Engineering Advisor to the New Mexico Commissioner from 1947-1955, later testified: "Problems were quickly apparent because there was an immediate negative departure which was startling. There was no known cause at that early date because no known changes had taken place on the river." Synopsis of Testimony of John R.

Erickson Pursuant to Paragraph 5(c), Trial Procedures of the Special Master's Pre-Trial Order of October 31, 1977, at 2 (Feb. 1978). It became apparent that corrections should be made. Stip. Ex. 4 at 234 (Commission meeting, Jan. 31, 1961, containing Joint Memorandum of Pecos River Commissioners, dated Aug. 23, 1960, which reviewed in part the Commission history).

The Commission directed its engineers, under Articles V(d) and VI(a) of the Compact, to undertake the examination needed to make corrections for apportioning Pecos River water under Article III of the Compact more accurately. Pending completion of the work it held in abeyance the making of any findings of fact for administering the apportionment of the river. Stip. Ex. 4 at 59, 76, 174 (Commission meetings, Jan. 22, 1953, Feb. 15, 1954, July 29, 1957); Stip. Ex. 2 at 38, 46 (Engineering Advisory Committee meetings, Jan. 21, 1953, Jan. 4-5, 1954). The work took almost ten years. In the meantime, however, years of additional data, including rainfall and stream flow records, became available. In addition, electronic digital computers became available. Stip. Ex. 4 at 234-36 (Commission meeting, Jan. 31, 1961). The delay thus provided scientific benefits.

Finally, the engineers completed the work and produced their Report on the Review of Basic Data (hereinafter "Review of Basic Data"), which the Commission on January 31, 1961 adopted under Article V(d) of the Compact as "amendments, refinements and additions to the basic data of the Commission and considered as such in all actions and findings of the Commission, and as representing the best information on the subjects covered thereby." Stip. Ex. 4 at 247. Using the Review of Basic Data, the Commission made findings of fact in 1961 on deliveries of water at the state line from 1950-1959 and found no deficiencies in the supply to Texas.[4] Stip. Ex. 4 at 247, 241-42.

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[4]The figures did not reflect the depletion, if any, that might have been caused by pumping of water below Carlsbad. Stip. Ex. 4 at 242.

In 1962, the Commission completed, corrected and extended its earlier findings of fact. Again, using the Review of Basic Data, the Commission made findings of fact on whether Texas had received the proper amount of water under the Compact for the period 1950-1961. The Commission decided Texas' supply had been deficient by only 5,300 acre feet over the entire twelve year period. It did not go on to consider whether that deficiency came from natural causes, for which New Mexico would not be responsible, or from beneficial use in New Mexico, for which New Mexico would be responsible. Stip. Ex. 4 at 256-57 (Commission meeting, Nov. 9, 1962).

After the Commission accepted the Review of Basic Data and the findings of fact based on the Review of Basic Data, the engineers proceeded to prepare an inflow-outflow manual. The manual was to contain the same procedures as in the Review of Basic Data. It was, however, to draw those procedures out to put them in a handbook form. That way the procedures could be more readily used for making annual findings in the future years. *See* Stip. Ex. 4 at 399 (Commission meeting, Jan. 28, 1971).

The task of completing the inflow-outflow manual was assigned to the Inflow-Outflow Subcommittee. By 1963 a draft of the inflow-outflow manual had been completed. In 1967 a draft was transmitted from the Inflow-Outflow Subcommittee to the Engineering Advisory Committee. In 1969 a revised draft inflow-outflow manual was submitted to the Engineering Advisory Committee. In addition, trial computations for findings of fact on water deliveries from 1962-1968 were submitted by the New Mexico engineer advisors to the Texas engineer advisors. Stip. Ex. 4 at 325, 354, 360 (Commission meetings, Nov. 6, 1968, Jan. 28, 1970, July 21, 1970); Stip. Ex. 2 at 262 (Engineering Advisory Committee meeting, Feb. 20, 1967).

Before the Engineering Advisory Committee finally acted on the inflow-outflow manual,[5] however, key people in the administration of the Compact died. Royce J. Tipton, who began as engineer advisor to the federal representative during Compact negotiations and was then hired at the request and upon the payment of both states to serve as engineer advisor to the Pecos River Commission and as chairman of the Engineering Advisory Committee, died on December 23, 1967, after almost thirty years of service on the Pecos River. In 1968, Mr. Wilson, Texas' Commissioner for nineteen years, died. Stip. Ex. 4 at 316-18 (Commission meeting, Nov. 6, 1968).

When the Commission met again in 1969 with the new Commissioners, cooperation on the Commission began breaking down. First, Texas Commissioner McGowen, without going through the Compact Commission or the Engineering Advisory Committee, asked the Texas staff for a unilateral engineering analysis of New Mexico's Compact delivery obligations. Stip. Ex. 4 at 369 (Commission meeting, July 21, 1970). Texas used for her analysis the 1947 routing study that had been rejected by the Commission at the outset of Compact administration as too full of error, omission and inconsistency to describe accurately the apportionment embodied in the Compact. Stip. Ex. 4 at 369, 471 (Commission meetings, July 21, 1970, Feb. 2, 1974). Texas' analysis claimed there was a 1,100,000 acre-foot deficit in the amount of water she had received and it was chargeable to New Mexico. Stip. Ex. 4 at 369, 471 (Commission meetings, July 21, 1970, Feb. 21, 1974). New Mexico was given an opportunity to review Texas' work, but with only enough time to check Texas' arithmetic. Stip. Ex. 4 at 383 (Commission meeting, Jan. 28, 1971). When New Mexico reminded the Texas Commissioner of the Commission's findings in 1961 and 1962, he replied that he

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[5]Between 1962 and 1967 the Commission's attention was turned to other matters, such as water salvage. *See generally* Stip. Ex. 4, Stip. Ex. 2.

was not a Commissioner then. Stip. Ex. 4 at 398 (Commission meeting, Jan. 28, 1971).

On January 29, 1970, Texas Commissioner McGowen also brought in a new lawyer to serve the Commission. That same day he asked the legal committee to review the legality of the Joint Memorandum of August 23, 1960, in which the Texas and New Mexico Commissioners had made agreements on administration of the river. Stip. Ex. 4 at 357 (Commission meeting, Jan. 29, 1970). For the first time in the history of the Compact, the legal committee was unable to render an opinion because its members could not reach agreement. Stip. Ex. 4 at 366 (Commission meeting, July 21, 1970).

The disputes continued and in early 1974 Texas Commissioner McGowen finally formally announced: "We repudiate the Review of Basic Data as a basis for Commission action in determining the amount of water to be apportioned to Texas under the Pecos River Compact, because the same has operated to deprive Texas of the water to which it is entitled. . . ." Stip. Ex. 4 at 472 (Commission meeting, Feb. 21, 1974). Texas, he announced, would "look elsewhere to obtain enforcement of its rights. . . ." Stip. Ex. 4 at 481 (Commission meeting, Feb. 21, 1974). Subsequently in 1974 and 1975, Texas, who held the chairmanship of the Engineering Advisory Committee, failed to call Engineering Advisory Committee meetings. She said there would be no point in meeting, for the proper forum was the Court, not the Commission. Stip. Ex. 4 at 490-91, 505 (Commission meetings, Feb. 20, 1975, March 11, 1976).

So ended the Commission function that during the first twenty years had led commentators to remark:

> [T]he Pecos Commission must be rated as a success . . . it was well received at the outset, and the Commission was

> able to begin operations free from the old grudges which have marred the work of other water allocation agencies. . . . The Commissioners have been chosen with care and have gone about their job with the conviction that the Compact can be effective in solving the water problems in the basin. The states have scrupulously honored the Compact and done everything to meet the Compact requirements.

Leach and Sugg, THE ADMINISTRATION OF INTERSTATE COMPACTS 166-67(1959).

B. The Litigation

Texas began this lawsuit against New Mexico in June of 1974, four months after she formally repudiated the Review of Basic Data. Motion for Leave to File Complaint, Complaint and Brief in Support of Motion. The Master appointed by the Court, after initial proceedings, decided on May 6, 1977 to remand the case to the Commission to give the parties until January 1, 1979 to resolve their differences. Report of Special Master on His Decision and Supplemental Decision Regarding the Affirmative Defenses of New Mexico to Complaint of Texas at 29 (issued July 6, 1977) (hereinafter cited as "1977 Report").

Texas objected to the Master's remanding the case to the Commission. 1977 Report at 31. Texas Commissioner McGowen called a special meeting of the Commission on June 16, 1977 and promptly moved that the Commission make eight findings on New Mexico's Brantley Dam, some of which would have required Compact amendment. The New Mexico Commissioner objected. The meeting lasted eighteen minutes. Stip. Ex. 4 at 524-41. Commissioner McGowen unilaterally arranged to have that transcript and a previous one sent to the

Master within days after the June 16 meeting. Upon receiving the transcript, the Master vacated his May 6 decision remanding the case to the Commission, denied all of New Mexico's affirmative defenses and directed the parties to prepare for trial. 1977 Report at 32-36.

In the first stage of the case, Texas challenged the Commission's authority to use the Review of Basic Data, which corrected information and data in the 1947 routing study, in lieu of the 1947 routing study, on which Texas had based her calculations.[6] That stage ended in 1980 when the Master concluded, in pertinent part, that the Commission did have the authority to make such corrections in order to better effect the apportionment under the Compact. The Supreme Court affirmed his decision. Report of Special Master on Obligation of New Mexico to Texas Under the Pecos River Compact (filed Oct. 15, 1979), *aff'd*, 446 U.S. 540 (1980).

Having failed to eliminate the Review of Basic Data altogether, Texas next challenged specific portions of the Review of Basic Data. Texas raised question about eleven ways in which the Review of Basic Data differed from the 1947 routing study on which Texas based her claims. Those eleven issues were set forth for consideration in Paragraph 4(b) of the Pre-Trial Order of October 31, 1977. The Master heard evidence on these issues in 1978, 7 Tr. 350 through 22 Tr. 2293, but did not make final conclusions. New Mexico and Texas, however, subsequently reached agreement on seven of the eleven issues; Texas accepted the Review of Basic Data for those seven issues. 24 Tr. 3293, 3314 (Hearing Oct. 20, 1980); Master's Exhibits 12, 17, 18 (Letters describing parties' agreements and disagreements); Affidavit of Carl L. Slingerland, dated Dec. 11, 1981,

[6]Texas pursued this challenge even though the Texas Attorney General had issued Opinion No. M-535 saying the Commission had acted within its prescribed powers in adopting the Review of Basic Data. Joint Ex. 12(a) (d).

paragraph 9 (Affidavit attached to New Mexico's Objections to Special Master's Order of December 1, 1981, dated Dec. 15, 1981).

Texas was then to produce reports in early 1980 on the remaining Paragraph 4(b) issues. Master's Exhibit 10. Texas did not do so. On January 14, 1981 the Master finally ordered Texas to file its final statement on the remaining Paragraph 4(b) issues by April 14, 1981. Again, Texas did not do so. Master's Report and Recommendations at 10 (filed Oct. 18, 1982) ("Texas did not state its position on the [Paragraph] 4(b) issues as it had been required to do in the Master's January 14 order"). Instead, Texas proposed to the Master an altogether new method of Compact administration known as the double mass method. Texas' Paragraph 4(b) Submission (dated April 13, 1981).

New Mexico objected to Texas' action in proposing the double mass method to the Court. New Mexico pointed out that under Article VI of the Pecos River Compact, the proposed new method of Compact administration could be properly addressed only by the Pecos River Commission, not the Court. Article VI (c) provides, in pertinent part: "unless and until a more feasible method is devised and adopted by the Commission the inflow-outflow method, as described in the Report of the Engineering Advisory Committee, shall be used . . . ." Adoption of the proposed new method would require unanimous action by the Commission, as took place when the Commission adopted the Review of Basic Data. *E.g.*, Master's Exhibit 21 (Letter of June 5, 1981 from Richard A. Simms, counsel for New Mexico, to the Honorable Jean S. Breitenstein).

The Master heard argument on this issue on July 27, 1981. He did not then rule on it, but instead ordered the parties to present evidence at a hearing on Texas' proposed new method, to begin within one month, on August 24, 1981. 35 Tr. 3384 l.6-8. After hearing comment on his order, the Master proposed an

alternative order: that the parties instead "show cause on or before August 15 why the case should not be dismissed on the ground the Compact is not workable." 35 Tr. 3388-89. Finally, he settled upon an order directing the parties to negotiate for ninety days to see if they could reach a settlement; if they could not, each party would have to file a statement showing cause why the action should not be dismissed on the ground that performance of the Pecos River Compact was impossible. Order of August 6, 1981.

The parties were not able to reach settlement in ninety days, Joint Report to the Court (dated Oct. 27, 1981); so, in accordance with the Master's order, the parties briefed and argued the issue of whether the Compact was workable. Both states contended the Compact was workable. New Mexico's Memorandum on Impossibility of Performance (dated Nov. 18, 1981); Texas "Workability" Statement (dated Nov. 18, 1981). At oral argument on the issue on November 30, 1981, the Master unexpectedly announced that he proposed to vacate Paragraph 4(b) of the Pre-Trial Order, 36 Tr. 3408 l. 2-5; and on the next day, December 1, 1981, the Master entered an order both vacating Paragraph 4(b) of the Pre-Trial Order and setting trial to begin in a month, on January 4, 1982, to hear evidence "with regard to the preparation and submission to the Special Master of a new Inflow-Outflow Manual."

Despite the questions and objections of the parties,[7] the Master retained his order vacating Paragraph 4(b) of the Pre-Trial Order and insisted "the Review of Basic Data [is] out for the purposes of this case." 37 Tr. 3455 l. 12-14 (Hearing of Dec. 21, 1981); *see also* Order of Dec. 29, 1981. The Master did, however, change the time and purpose of trial. This time he set

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[7]New Mexico's Objections to Special Master's Order of December 1, 1981 (dated Dec. 15, 1981); Texas' Motion for Clarification of Master's December 1, 1981, Order and Motion for Continuance (dated Dec. 14, 1981).

trial for March 8, 1982 on the "basic facts, unmeasured values and techniques" to be used for determining stream flows. Order of Dec. 29, 1981. Thus, the case which had begun with a unilateral repudiation of the joint action of the Pecos River Commission in using the Review of Basic Data to effect more accurately the agreed-upon division of water under the Compact, and which continued to challenge the Commission's use of the Review of Basic Data, officially turned away from the Review of Basic Data on the order of the Master.

In the March 1982 trial, Texas presented evidence on alternative methods of Compact administration. First, she moved the Court to use the double mass method and she presented evidence on that point. In response, New Mexico opposed the use of the double mass method, both on legal and evidentiary grounds. 38 Tr. 3486 through 40 Tr. 3940 (March 8-10, 1982); Texas' Motion to Use the Double Mass Inflow-Outflow Method to Account for Stream Flows in the Determination of the 1947 Condition Base Relationship, and supporting Memorandum (dated Jan. 15, 1982); New Mexico's Response to Texas' Motion to Substitute Texas' Double Mass Procedure for the River Routing Study Under the Compact (dated Feb. 19, 1982).

Secondly, even though the Master had officially eliminated the Review of Basic Data Paragraph 4(b) issues from the case, Texas presented evidence on the Review of Basic Data and on her remaining objections to the Review of Basic Data. New Mexico responded with evidence on the Review of Basic Data issues[8] but also with a motion to dismiss. Motion to Recommend Final

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[8]40 Tr. 3940 through 43 Tr. 4393 (March 10-15, 1982); Texas Exhibit 48 (Texas' Statement on Basic Facts, Unmeasured Values and Techniques, Jan. 15, 1982); New Mexico Exhibit 54 (New Mexico's Statement Regarding Basic Facts, Unmeasured Values and Techniques for Determining Stream Flow as Required by the Special Master's Dec. 29, 1981 Order, dated Feb. 19, 1982).

Decree and to Dismiss, and supporting Memorandum (dated Feb. 19, 1982). New Mexico moved to dismiss because the Master, having eliminated the Review of Basic Data from the case, could not proceed to make *de novo* the administrative findings and decisions delegated to the Pecos River Commission; to do so would exceed the judicial power under Article III of the Constitution.

After the hearing, the Master issued his Report and Recommendations. He did not rule on the evidence presented. Instead, his key recommendation was that the Court vest in a third party the power to vote to break ties on the Commission and that the Court retain jurisdiction but order the states to return to the Commission for performance of its duties. The question of the Court installing a third party tie-breaker on the Commission had not been previously raised in the case and was not briefed before the Master.

The Master also recommended that New Mexico's motion to dismiss be denied and that Texas' motion to substitute the double mass method for that in the Compact be denied without prejudice to Commission consideration of such a method. The Supreme Court accepted the Master's Report and Recommendations for filing October 18, 1982 and invited the parties to submit their exceptions and objections. Order of Oct. 18, 1982.

ARGUMENT

Summary of Argument

The Master's key recommendation to the Court in this case is that the Court vest in a third party the power to vote as a tie-breaker on the Pecos River Commission. Under the Pecos River Compact, which established the Pecos River Commission, only Texas and New Mexico may vote on the Commission; the third party, the federal representative, is specifically prohibited from voting. In proposing that the Court now give the federal representative or some other third party voting power on the Commission, the Master is in effect recommending that the Court rewrite the Pecos River Compact. The Compact is a solemn agreement between sovereign states, enacted into law in both states and sanctioned by Congress. It is not within the judicial power to rewrite the Compact. The parties may amend the Compact, if they so desire, but the Court may not rewrite it. The Court would be exceeding its judicial authority and invading the legislative power and state sovereignty if it did so.

Although the Court may not rewrite the Compact, the Court should, consistent with its judicial powers, review the findings of fact the Commission made in 1962 and the Review of Basic Data, on which the findings were based. Texas repudiated the Review of Basic Data in 1974 and was still contesting portions of it in March of 1982. The Master, however, has declined to consider or rule on the Review of Basic Data issues even though Texas still contests them. The Master should be directed to proceed with judicial review of the Review of Basic Data and the findings of fact, so long as Texas continues to question the validity of the Review of Basic Data and the Commission's findings of fact. Alternatively, if the Court decides it need not review the Commission's findings, it should dismiss the case for the Court may not, under Article III of the United States Constitution, make on its own the administrative findings delegated by the Compact to the Pecos River Commission.

I.

THE COURT MAY NOT REWRITE THE PECOS RIVER COMPACT BY CHANGING CRITICAL VOTING PROVISIONS BECAUSE IT WOULD BE INVADING THE LEGISLATIVE POWER AND STATE SOVEREIGNTY.

The Pecos River Compact is an agreement between Texas and New Mexico, and the agreement is a binding one. New Mexico agreed to limit her use of Pecos River water in reliance on the terms she negotiated in the Compact. States enter these agreements carefully, solemnly, and expect their terms to be respected. The proper role of the courts should be to make the states adhere to the bargain they struck.

The difficulty here is that Texas became dissatisfied with the terms of the bargain she struck. Texas does not want to get out of the Compact altogether, for she still wants to bind New Mexico to the Compact's limits on New Mexico's use of water. In pursuing this lawsuit Texas just wants to improve her position. The proper place for Texas to seek amendment of the Compact is in the state legislatures, not the Court.

The Master has nevertheless recommended that the Court rewrite the Compact. The Pecos River Compact gives each state a vote on the Commission but denies voting power to the federal representative.[9] The Master proposes that the Court give voting power to the federal representative or to some third party.

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[9]The Pecos River Compact states that the United States representative to the Pecos River Commission "shall not have the right to vote in any of the deliberations of the Commission." Article V(a). The Commission's Rules of Internal Organization repeat that restriction in two places; they emphasize that the Commissioner representing the United States "shall not have the right to vote." Article II, Clause 2 and Article IV, Clause 8, Stip. Ex. 4 at 9, 11-12, 18,

Report and Recommendations at 2-3 (filed Oct. 18, 1982). The proposed change is directly contrary to the terms of the Compact. If the legislatures wanted to make this change, they could. The Court, however, may not. It does not have the authority to rewrite an interstate compact, approved by two state legislatures and sanctioned by Congress.[10]

In *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951), a key case in interstate compact law, the Court considered a closely analogous situation. There, the West Virginia Supreme Court of Appeals had decided that West Virginia, although a signatory state, was not properly a party to a multistate compact to control pollution in the Ohio River system. The effect of the state court decision was to revise a critical and express element of the Compact: the interstate membership. The United States Supreme Court reversed the state court's ruling, saying the state court could not so nullify "an agreement solemnly entered into between States." 341 U.S. at 28. If the state court may not nullify an agreement solemnly entered into between states, neither may a federal court nullify an agreement by rewriting its terms.

The United States Court of Appeals for the Ninth Circuit not long ago ruled that courts are not empowered to rewrite compacts. *California ex rel. Younger v. Tahoe Regional Planning Agency*, 516 F. 2d 215 (9th Cir.), *cert. denied*, 423 U.S. 868 (1975). In that case California sued to stop construction of a hotel-casino which had been deemed approved

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38, 120, 209, 212 (Commission meetings on Dec. 9-10, 1949, Jan. 18, 1951, Jan. 24-25, 1956, and Oct. 27, 1960, promulgating, extending and repromulgating the rules). Only the New Mexico Commissioner and the Texas Commissioner have that right. Pecos River Compact, Article V(a); Commission's Rules of Internal Organization, Article IV, Clause 8, Stip. Ex. 4 at 11-12, 18, 38, 120 and 212.

[10]Laws of New Mexico 1949, p. 31; Texas' General Laws 1949, p. 51; 63 Stat. 159 (1949).

because of the Tahoe Regional Planning Agency's failure to take action.[11] The Ninth Circuit rejected California's appeal and pointed out: "That the Compact may not be a powerful anti-growth measure in that it permits a majority of one state to stop effective action by the [agency] is not the result of a court imposed interpretation, but of deliberate action by the legislatures of Nevada and California and the Congress of the United States." 516 F. 2d at 220. California's remedy was to appeal to those legislatures. "This court," the Ninth Circuit concluded, "is not empowered to rewrite the Compact." 516 F. 2d at 220.

Interstate compacts are statutes and courts may not rewrite statutes. In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,* 435 U.S. 519 (1978), the Supreme Court stopped a lower court from adding procedural requirements to those specified in the Administrative Procedure Act. The Act set the maximum procedural requirements which Congress was willing to have the courts impose on agencies. Courts may not, on their own notions of what is best, require procedures beyond those in the statute.[12]

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[11]Under the Tahoe Regional Planning Compact, a majority vote of the members of each state, California and Nevada, was required before the agency could act. If the agency failed to act on a project within sixty days, either approving or rejecting it, then the project would be deemed approved. At the agency meeting on the hotel-casino project, California's five delegates voted against the project and two of Nevada's five delegates voted against it as well; but the three remaining Nevada delegates voted for it. Although an absolute majority of the delegates voted against the project, the majority of each state did not vote against it. Because the states split on the issue, the agency, according to the Compact voting provisions, failed to act and the project was deemed approved.

[12]Courts may, of course, require compliance with constitutional constraints. The case the Master relies on in suggesting the Court rewrite the Pecos River Compact was one involving constitutional constraint: *British Airways Board v. Port Authority of New York and New Jersey,* 564 F.2d 1002 (2d Cir. 1977). Report and Recommendations at 18 (filed Oct. 18, 1982). There the Second Circuit upheld the lower court's order dissolving the Port

In *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942), the Supreme Court reversed a lower court's decision in effect revising a statute because "it ignores the plain Congressional mandate . . . . If this mandate is to be changed, it must be changed by Congress, and not by the Courts."[13] 316 U.S. at 43. The Court refused to legislate. The Court similarly refused to legislate in *Rees v. Watertown*, 86 U.S. (19 Wall.) 107 (1874). There the Court decided it could not levy a tax on individual property to satisfy a city's debts contrary to a law prohibiting the levy of such a tax. A court of equity does not do justice by violating the law.[14]

The Court adheres to the choices Congress and state legislatures have made, even though it might have made those choices differently. *See e.g., Labine v. Vincent*, 401 U.S. 532, 538-39 (1971); *Dandridge v. Williams*, 397 U.S. 471, 487 (1970). A statute "is not an empty vessel into which this Court is free to pour a vintage that we think better suits present-day tastes." *United States v. Sisson*, 399 U.S. 267, 297 (1970). Courts, like the rest of society, are bound to honor the law and respect the limits of their jurisdiction.

Authority's ban on Concorde landings at Kennedy Airport. The Authority's delay in promulgating noise rules for Concorde flights was deemed an undue burden on interstate commerce. Although the court reversed the Authority's decision banning the flights pending the rulemaking, it did not attempt anything so fundamental as rewriting applicable legislation. The Master's reliance on the *Port Authority* case is misplaced because the case does not support the proposition that courts may rewrite statutes.

[13] There the question was whether seamen had a right to strike when the ship was moored in a safe port even though the statute required the crew to obey lawful commands of the ship's master "whether on board, in boats, or on shore . . . ." The lower court had decided that because the need for absolute authority was diminished when the ship was in a safe port, the seamen had the right to strike.

[14] "Were it [the judicial power] joined with the legislative, the life, liberty and property of the subject would be in the hands of arbitrary judges, whose decisions would then be regulated only by their own opinions and not by any fundamental principles of law . . . ." *Gordon v. United States*, 117 U.S. 697, 706 (1864).

Moreover, the Special Master's recommendation that the Court vest the United States representative on the Pecos River Commission or a third party with the power to vote to resolve any impasse on the Commission is analogous to appointing an arbitrator to resolve disputes. Courts may not appoint arbitrators and direct the arbitrator to resolve disputes between parties; the obligation to arbitrate is founded on contract and in the absence of agreement, the parties to a contract can not be compelled to submit a dispute to arbitration. *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962); *Gateway Coal Co. v. Mine Workers of America*, 414 U.S. 368, 374 (1974); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). The courts do not have the "right to rewrite [a] contract merely because . . . it might . . . have been functionally desirable" to make every dispute the subject of arbitration. *Moreira Construction Co. v. Township of Wayne*, 98 N.J. Super. 570, 238 A.2d 185, 189 (1968).

The Pecos River Compact is a law and courts must follow the law. The Compact prohibits the federal representative from voting. Article V(a). Only Texas and New Mexico vote on the Commission. A Court decision requiring the federal representative, or some third party, to vote would be rewriting the terms of the Compact contrary to the plain agreement and enactment of the states, as sanctioned by Congress. A court may not so legislate. *E.g., Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Southern Steamship Co. v. NLRB*, and *Rees v. Watertown, supra.*

The Court's refusal to intrude on the legislative domain should be even stronger here, for the Compact is no ordinary piece of legislation. It is a binding agreement between two states, each "reluctant to relinquish very much sovereignty." *California ex rel. Younger v. Tahoe Regional Planning Agency*, 516 F. 2d 215, 220 (9th Cir.), *cert. denied*, 423 U.S. 868 (1975). The states take

great care to set Compact terms to protect their citizens, limiting and controlling their commitments. Under the circumstances, a court should take special care not to rewrite interstate compacts.

Rewriting the Pecos River Compact, if that is to be done, is the responsibility of the legislatures of Texas and New Mexico, not the courts. The states of Texas and New Mexico carry the responsibility of changing the voting provisions of the Compact if they think it wise.[15] The Court, by rewriting the Compact, would be intruding on the states' sovereignty and on the legislative power. The Court should, therefore, reject the Master's suggestion that it vest in the federal representative, or other third person, power to vote on the Commission when the states do not agree on the issues. As a matter of law, the Court should not rewrite the Pecos River Compact.

Refusing to rewrite the Compact is not only sound law but also sound policy, for a compact is a contract or treaty between quasi-sovereign powers, *e.g.*, *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 31, 36 (1951); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104 (1938); and states entering compacts alter their positions in reliance on the binding nature of interstate compacts.[16] *E.g.*, *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 36 (1951) (concurring opinion). The Court has encouraged states to enter into interstate compacts, *e.g.*, *West Virginia ex rel. Dyer v. Sims*, *supra*, 341 U.S. at 26-27;

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[15]"[O]ur society has turned over to our judicial and quasi-judicial systems too many questions of public policy that timorous politicians are unwilling to handle themselves." Bell and Adamson, "Notes on the Situation," 462 The Annals of the American Academy of Political and Social Science 16, 18 (July 1982).

[16]New Mexico in the Pecos River Compact agreed to limit her beneficial use of the water in the future to that portion she would have received under the "1974 condition." In exchange Texas relinquished any claims she had in excess of that amount. Both states set strict terms on how the Compact would be administered. Pecos River Compact, Articles III and V. *See also* S. Doc. No. 109, 81st Cong., 1st Sess. xv (1949) ("The compact reflects a compromise") (letter from acting Secretary of Interior to Senate Committee on Insular Affairs).

Colorado v. Kansas, 320 U.S. 383, 392 (1943), because interstate disputes "present complicated and delicate questions. . . [requiring] expert administration rather than judicial imposition of a hard and fast rule." *Colorado v. Kansas, supra*, 320 U.S. at 392.[17]

Despite the encouragement, states approached interstate compacts and interstate compact agencies with suspicion. The degree of their distrust diminished, however, when the Court issued its decision in *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951), affirming the binding nature of the interstate compact. West Virginia's Supreme Court of Appeals there held that West Virginia's participation in an interstate compact with seven other states violated the state constitution. In the proceeding that followed, the United States urged the United States Supreme Court to read the Compact to allow any signatory state to withdraw from its obligation at any time. The Court refused to do so. It held the Compact binding on the signatory states and reversed the decision of the West Virginia Supreme Court of Appeals. Commentators remarked that "Thanks to the decision of the Supreme Court in the case of *West Virginia ex rel. Dyer v. Sims*. . . which tested West Virginia's membership in the Ohio River Valley Water Sanitation Compact, states may . . . proceed in the assurance they are on firm ground." Leach and Sugg, THE ADMINISTRATION OF INTERSTATE COMPACTS 12-13 (1959) (hereinafter cited as "Leach and Sugg").

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[17] Frankfurter and Landis early noted that interstate adjustments frequently are not amenable to a single, final, inflexible decree; they concluded that the interstate agreement which establishes an administrative agency for continuing study and action is "the legal institution alone adequate to the task" of managing interstate natural resources. "The Compact Clause of the Constitution — A Study in Interstate Adjustments," 34 Yale L.J. 685, 701 (1925).

Commitment to interstate compacts grew dramatically during the next few decades. Before 1920, there were only 36 interstate compacts. Between 1921 and 1940, states entered about 20 more. In the period between 1940 and 1975, however, the states negotiated over 100 additional compacts. Zimmerman and Wendell, THE LAW AND USE OF INTERSTATE COMPACTS ix (Introduction by Brevard Crihfield, Executive Director of Council of State Governments) (1976) (hereinafter cited as "Zimmerman and Wendell"). By 1979 there were about 175 interstate compacts, many with administrative agencies, used in an ever-expanding number of fields: pollution control, education, forest fire protection, fisheries research, flood control, water allocation, mass transportation, energy conservation, law enforcement and taxation, among them. *See generally* Council of State Governments, INTERSTATE COMPACTS AND AGENCIES (1979). Virtually every state in the Union became party to a compact. Leach, "The Federal Government and Interstate Compacts," 29 Fordham L. Rev. 421, 422 (1961). By the 1970's commentators felt free to say: "the interstate compact is the instrument best suited for the establishment of permanent arrangements among the states . . . ." Zimmerman and Wendell at 40.

Because interstate compacts are still "offsprings of a marriage between sovereign partners, each extremely reluctant to relinquish its sovereignty . . .", *California ex rel. Younger v. Tahoe Regional Planning Agency*, 516 F.2d 215, 218 (9th Cir.), *cert. denied*, 423 U.S. 868 (1975), states continue to control the administration and execution of interstate compacts after ratification.[18] Most importantly, states control compact actions

[18]They appoint the members of commissions and set their terms. They appropriate the money to administer the compacts. They retain the right to investigate the activities of the compact commission. Leach and Sugg at 25-41. All of this is true of the Pecos River Compact. Article V(a), (b) and (e).

by establishing voting procedures which protect the states' interests. Leach and Sugg at 25-41. Compacts in general operate under variations of the unanimity rule.[19] The Pecos River Compact is one of those requiring unanimity.[20]

The Pecos River Compact makes agreement of the states essential. The Pecos River is difficult and the Compact administration is correspondingly complex. For this reason, the states retained control and required unanimity. In 1949 when Texas and New Mexico ratified the Pecos River Compact, they knew that the requirement for unanimity might block Commission action; nevertheless, they did not give the federal representative a vote, and in the ensuing years neither state went to its legislature to propose that the Compact be modified. The states chose to make this unanimity requirement a term of the Compact and both states and courts should honor it.

If courts do not honor the terms of interstate compacts but instead feel free to rewrite them, compacts lose their mutually binding nature. This change would undermine the base on which

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[19]Zimmerman and Wendell at 48-49, referring to a study in Vawter, INTERSTATE COMPACTS — THE FEDERAL INTEREST (1954); *see also* Muys, INTERSTATE WATER COMPACTS 14 (1971).

For compacts requiring unanimity, *see e.g.*, Arkansas River Basin Compact, Art. X(D), 80 Stat. 1409, 1413 (1966); Belle Fourche River Compact, Art. III, 58 Stat. 94, 96 (1944); Big Blue River Compact, Art. III, §3.3, 86 Stat. 193, 195 (1972); Canadian River Compact, Art. IX(a), 66 Stat. 74, 77 (1952); Costilla Creek Compact, 60 Stat. 246, 254 (1946); La Plata River Compact, Art. III, 43 Stat. 796, 797 (1925); Rio Grande Interstate Compact, Art. XII, 53 Stat. 785 (1939). Not all compacts, however, require unanimity, and some designate the federal representative as a tie-breaker. *E.g.*, Yellowstone River Compact, Art. III(F), 65 Stat. 663, 666 (1951); Snake River Compact, Art. VI(C), 64 Stat. 29, 32 (1950).

[20]Pecos River Compact, Article V(a) (each state has one vote); S. Doc. No. 109 at 124 (Meeting of Dec. 3, 1948) (Unanimity required for Commission action); Commission Rules of Internal Organization, Article IV, Clause 9, Stip. Ex. 4 at 212 (Commission meeting, Oct. 29, 1960) (Commissioners of signatory states must concur in any action taken by Commission).

all interstate compacts are built. States could then go to court to escape selected provisions or to change to their advantage certain compact terms, hopeful that the court will grant them some relief if they persist.

Here, when Texas became dissatisfied with her entitlement under the Pecos River Compact, she repudiated the Commission's work, Stip. Ex. 4 at 472 (Commission meeting, Feb. 21, 1974), and filed suit. First she asked the Court to undo the agreements of the Commission; when that failed, she urged the Court to engraft on the Compact an altogether new method of administration, one contrary to its express terms.[21] For over eight years Texas pursued the Court to change what the Commission had done or what the Compact required, without freeing New Mexico of her covenants under the Compact. The Master in frustration has finally been moved to recommend that the Court change the Compact terms and then send the complaining party back to the Pecos River Compact Commission table. Report and Recommendations at 2-3 (filed Oct. 18, 1982).

Although the Master recommends that the Court return the matter to the Commission, he proposes that the Court first rewrite the critical voting provision in the Compact by giving the federal representative or some third party a tie-breaking vote on the Compact Commission. He suggests that this relief is acceptable because the states must have expected courts to provide some such mechanism for resolution of disputes. Report and Recommendations at 25-26. The compacting states, however, contemplated judicial review, not revision.

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[21] The agreement she sought to undo was the Commission's agreement to approve the Review of Basic Data. This effort was rejected by the Court. 446 U.S. 540 (1980). Then Texas sought to have the Court engraft on the Compact a new method, double mass diagramming, to replace the Review of Basic Data. *E.g.*, Texas Paragraph 4(b) Submission (dated April 13, 1981).

The proposed solution of giving the federal representative or other third party a vote even though the Compact forbids it, threatens to destabilize the base of values on which interstate compacts are built. It erodes the public policy of fostering such accommodations between states. Although the proposal is an effort to serve the states, it overlooks their sovereignty and casts aside their sovereign choices. The proposed solution, in attempting to solve a specific problem, promises to cause much larger ones.

Moreover, the Master's proposal will likely fail to cure even the specific problem it seeks to address. The proposal, if accepted, may end up disposing of the problem without resolving it.[22] As the Master sees it, the difficulty is that the states have not been able to agree. Therefore, the solution he proposes is quite simple: add a third-party vote to break any deadlocks. It is a numerical solution to the problem and might appear to dispose of it tidily.

The difficulty is that the mathematical solution is not likely to end the disputes. A third party with controlling decision-making power under the Compact foisted on the states will not prevent the parties from returning to the Court to challenge each decision they question. Providing a method of getting a majority vote under the Compact will not end the disputes. The states themselves must both agree to accept a solution. Ultimately, the effective functioning of a compact turns on the states' willingness to act, not on compulsion. Leach, "The Federal Government and Interstate Compacts," 29 Fordham L. Rev. 421, 426 (1961).

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[22]Former Attorney General Griffin Bell, commenting on some of the difficulties of the judicial process, once noted: "It perhaps can be said that courts on occasion simply dispose of disputes more often than resolve them." Bell and Adamson, "Notes on the Situation," 462 The Annals of the American Academy of Political and Social Science 23 (July 1982).

No matter what the instrument of settlement, states have to accept the solution in order to abide by it. In *Wyoming v. Colorado*, for example, litigation continued for thirty-five years after the Court's decision, until the states themselves reached an accommodation. The Court equitably apportioned the waters of the Laramie River between Colorado and Wyoming in 1922, 259 U.S. 419, 260 U.S. 1; but disputes continued in the ensuing decades, 286 U.S. 494 (1932), 298 U.S. 573 (1936), 309 U.S. 572 (1940), until the parties finally agreed upon a decree to replace the first one. 353 U.S. 953 (1957). Legal compulsion, even in an equitable apportionment suit, did not quiet the difficulties. It tends to be even less effective under a compact, where parties must continue to administer resources cooperatively.

The proposal to give the federal representative or other third party voting power under the Pecos River Compact should, therefore, be rejected first, because it asks the judiciary to rewrite the Compact in excess of the judicial powers; second, because such judicial rewriting of compacts threatens to destabilize interstate compacts; and, third, because the proposed judicial rewriting would not likely resolve the disputes here.

II.
THE MASTER ERRED IN CONCLUDING THE COURT COULD OFFER NO RELIEF OTHER THAN REWRITING THE COMPACT BECAUSE THE COURT CAN AND SHOULD DECIDE THE JUSTICIABLE DISPUTES BEFORE IT.

Although the Court may not rewrite the Compact, it can and should review the disputed elements of the Commission's findings of fact. The Commission made findings of fact which later displeased Texas and led to this lawsuit. Instead of urging the Court to review the Commission's findings, though, Texas

has been encouraging the Court to change the Compact.[23] So long as Texas disputes the validity of the Commission's findings, those findings should be judicially reviewed.

In the confusion of this lawsuit, however, the Master decided not to proceed with review of the issues pertaining to the Commission's earlier findings. In making that decision, the Master wandered from the proper course. The Court should return the case to the Master with direction to proceed with review of the findings of fact that have been made by the Commission. A judicial decision on those issues would restore the Commission to its function. If, however, the Court agrees with the Master that judicial review of the Commission's findings is no longer relevant, then there are no justiciable issues left and the case should be returned to the Commission.

A. The Court Should Direct the Master to Review the Commission's Findings of Fact.

The Pecos River Compact delegates to the Commission the power to make findings on facts needed for administration of the Compact. Article V(d). The Compact authorizes the Commission to determine how much water should have crossed the state line each year under the 1947 condition, how much in fact crossed the line, and whether any deficiencies in the amount crossing the state line resulted from man's activities in New Mexico. This delegation of power under the Compact is no more than a customary delegation of power from a legislative body to an administrative agency. *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 30-31 (1951).

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[23] *E.g.*, Texas' Motion to Use Double Mass Inflow-Outflow Method to Account for Stream Flows in the Determination of the 1947 Condition Base Relationship (dated Jan. 15, 1982).

The Commission's findings of fact under the Pecos River Compact are reviewable in court. Article V(f). Judicial review of a compact agency's findings proceeds in accordance with compact terms. *See e.g., Williams v. Washington Metropolitan Area Transit Commission*, 415 F.2d 922 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1081 (1969); *D.C. Transit System v. Washington Metropolitan Area Transit Commission*, 350 F.2d 753 (D.C. Cir. 1965), *cert. denied*, 389 U.S. 847 (1967); *Brown v. Tahoe Regional Planning Agency*, 385 F. Supp. 1128 (D. Nev. 1973). Under the Pecos River Compact, "Findings of fact made by the Commission . . . shall constitute prima facie evidence of the facts found." Article V(f).

The Pecos River Commission made findings of fact in 1962.[24] The Commission considered whether Texas had received the proper amount of water under the Compact in the twelve years since Compact administration began. The Commission decided Texas' supply had been deficient by only 5,300 acre feet over the entire period of 1950 through 1961. It did not decide whether New Mexico uses, rather than natural causes, were responsible for this relatively small deficiency.[25] Instead, the Commission stopped at determining the overall deficiency and adopted those conclusions as formal findings of fact under the Compact. Stip. Ex. 4 at 256-58 (Commission meeting, Nov. 9, 1962).

Years later, through a new Commissioner, Texas decided she disagreed with those findings of fact and she filed suit challenging the basis of the findings. *See* Pre-Trial Order, Paragraph 4(a) and (b) (entered Oct. 31, 1977). The technical basis of the

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[24]The Pecos River Commission also made findings of fact in 1961. Stip. Ex. 4 at 247 (Commission meeting, Jan. 31, 1961). The 1962 findings of fact, however, corrected and expanded those made in 1961.

[25]New Mexico would be responsible under the Compact only if the deficiency were caused by man's activities in New Mexico, as opposed to natural causes. Article III(a).

findings is a document known as the Review of Basic Data. The Commission's engineers had developed the Review of Basic Data specifically for the purpose of enabling the Commission to make such findings of fact. *See* Stip. Ex. 4 at 247-48 (Commission meeting, Jan. 31, 1961, where the Commission adopted the Review of Basic Data for use in Commission findings).

The disputed issues concerning the Review of Basic Data and the parties' evidence on those issues have now been fully put before the Master in two segments of trial, one in 1978 and one in March 1982.[26] Only a few disputes remain. *E.g.*, 42 Tr. 4189 l. 15 (March 12, 1982); New Mexico Exhibit 54 at 4 (New Mexico's Statement Regarding Basic Facts, Unmeasured Values and Techniques for Determining Stream Flows as Required by the Special Master's December 29, 1981 Order, filed Feb. 19, 1982). The Master should be directed to decide the remaining disputes, taking the Commission's findings of fact, under Article V(f) of the Pecos River Compact, as prima facie evidence of the facts found.

If the Court decides the disputed issues underlying the Commission's findings of fact and completes its judicial review, the Commission can return to work. The technical basis of its findings will either be upheld or remanded with infirmities specified for correction. Judicial review will fix the lawfulness of

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[26] Before the trial in 1982, the Master vacated the portion of the Pre-Trial Order that set out the issues raised by Texas' technical challenges to the Review of Basic Data. He instead ordered the parties to go to trial on "basic facts, unmeasured values and techniques" needed for determining stream flows and administering the river. Order of December 29, 1981. In response, the states presented their evidence on the Review of Basic Data issues. 40 Tr. 3940 through 43 Tr. 4393 (March 10-15, 1982); New Mexico Exhibit 54 (New Mexico's Statement Regarding Basic Facts, Unmeasured Values and Techniques for Determining Stream Flows as Required by the Special Master's December 29, 1981 Order, filed Feb. 19, 1982); Texas Exhibit 48 (Texas' Statement on Basic Facts, Unmeasured Values and Techniques, with associated reports, filed Jan. 18, 1982).

the Commission's past actions and give direction to the Commission's future actions.

The Master suggests, however, that judicial review of these issues would be advisory, and therefore improper, because one Commissioner or the other will always block Commission action by using the one-state veto. Report and Recommendations at 21-22. The Master's suggestion is speculative and no basis on which to deny judicial review of the Commission's findings. The Commission stopped functioning not because of the one-state veto provision, but because Texas was dissatisfied with the Commission's findings. So long as Texas questions the Commission's findings, the Court should proceed with its review and put these matters to rest. There is no reason to believe that Texas will disregard the Court's decisions when review has been completed; but even if roadblocks were expected to arise later, the Court would not be absolved from deciding the justiciable issues before it now.

The Master also quarrels with the notion that the Review of Basic Data is still available for Commission use. He decided the Review of Basic Data was developed to be used in findings only for the period 1950 through 1961.[27] Report and Recommendations at 20 (filed Oct. 18, 1982). The Master is in error and New Mexico urges the Court to reject the Master's recommended decision. The Commission's purpose in undertaking the long and difficult study that led to the Review of

[27]The Master made a similar comment at 40-41 in his 1979 Report to this Court, but New Mexico did not bring it to this Court's attention then because it did not appear to be a finding of fact on that portion of the case; the Master himself had pointed out that "We have not reached the point in the case where the effect of the Texas approval of the [Review of Basic Data] for the determination of 1950-61 departures is significant." Report of Special Master on Obligation of New Mexico to Texas Under the Pecos River Compact at 41 (filed Oct. 15, 1979).

Basic Data was to correct basic information about the river so that the Commission could administer the river. *E.g.*, Stip. Ex. 4 at 174, 247 (Commission meetings, July 29, 1957 and Jan. 31, 1961). The Commission, did not intend to apply the Review of Basic Data only to the findings made in 1962; it never said that its work was to be set aside one year after completion, nor would it have been reasonable to undertake this task only for the purpose of throwing it out a year later. On the contrary, the Commission adopted the Review of Basic Data for "all actions and findings of the Commission." Stip. Ex. 4 at 247 (Commission meeting, Jan. 31, 1961).

In any event, these objections are not the reasons the Master gave for vacating the segments of the Pre-Trial Order providing for judicial review of the Review of Basic Data. The reasons he gave are three:

> (1) the failure of the States either to agree or to state their final positions on the issues posed by [Paragraph] 4(b); (2) the Texas rejection of both the 1947 routing study and [the Review of Basic Data] as a method of Compact administration ended the need for consideration of the differences between the 1947 routing study and [the Review of Basic Data]; and (3) a new inflow-outflow manual was necessary.

Report and Recommendations at 10-11 (filed Oct. 18, 1982). Each of the three reasons is in error. First, although Texas delayed long in doing so,[28] the parties did state their positions on

[28] Even though Texas delayed the lawsuit for years, *see* Report and Recommendations at 9-10, the Master suggests that delay in resolution of this suit serves New Mexico. Report and Recommendations at 15. New Mexico wants the dispute resolved. The uncertainty this litigation has produced is no aid to New Mexico.

the Review of Basic Data and reached agreement on most of the points.[29] Second, Texas continued to pursue her objections to the disputed parts of the Review of Basic Data after she proposed a new method of Compact administration; she contested those issues at trial in March of 1982 in the event her efforts to have the Court impose a new method failed, so the issues in Paragraph 4(b) of the Pre-Trial Order did not become irrelevant. 40 Tr. 3940 through 43 Tr. 4393. Third, the development of an inflow-outflow manual is not a prerequisite to review of the 1962 findings of fact or the Review of Basic Data, on which the findings were based, because both the findings and the Review of Basic Data were adopted without the development of an inflow-outflow manual. The inflow-outflow manual is only a guidebook; and in this instance, it would have been only a guidebook of procedures drawn from the Review of Basic Data.

Thus, the Master erred in refusing to proceed with his review of the decisions the Commission made. The Court should direct the Master to complete his review of the Commission's findings so the parties will know where they stand and the Commission can go back to work with the benefit of judicial decisions to guide its course.

B. If the Master Does Not Review the Commission's Findings, There Is Nothing Left for the Court to Review and the Court Should Return the Matter to the Commission.

If the Court agrees with the Master that the Master need not proceed with review of the Commission's findings and that the

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[29] *See* 40 Tr. 3940 through 43 Tr. 4393 (March 10-15, 1982); New Mexico Exhibit 54 (New Mexico's Statement Regarding Basic Facts, Unmeasured Values and Techniques for Determining Stream Flows as Required by the Special Master's December 29, 1981 Order, filed Feb. 19, 1982); Texas Exhibit 48 (Texas' Statement on Basic Facts, Unmeasured Values and Techniques, filed Jan. 18, 1982); 24 Tr. 3293, 3314 (Hearing, October 20, 1980); Master's Exhibits 12, 17, 18 (Letters describing the parties' agreements and disagreements); Affidavit of Carl L. Slingerland, dated December 11, 1981, paragraph 9 (Affidavit attached to New Mexico's Objections to Special Master's Order of December 1, 1981, dated Dec. 15, 1981).

issues challenging portions of the Review of Basic Data are no longer relevant, there is nothing left for the Court to review and the case should be dismissed. New Mexico moved to dismiss this case when the Master excluded the Commission's findings from the case because the Court could not go forward by making, on its own, the administrative findings of fact delegated to the Commission. *See* New Mexico's Motion to Recommend Final Decree and to Dismiss, and supporting memorandum (filed Feb. 19, 1982). Because the Master would not review the Commission's findings and could not make *de novo* administrative findings, no judicial function remained. The Master agrees courts may not take on the functions of an agency and make decisions delegated to the agency; nevertheless, he does not recommend dismissal of the case. Report and Recommendations at 2, 22-23.

It is fundamental that a court may exercise judicial powers only. *E.g., Federal Radio Commission v. General Electric Co.*, 281 U.S. 464, 469 (1930) (the Supreme Court cannot "exercise or participate in the exercise of functions which are essentially legislative or administrative"); *Keller v. Potomac Electric Power Co.*, 261 U.S. 428 (1923) (the Supreme Court dismissed the appeal because its jurisdiction under Article III of the Constitution did not extend to administrative functions). If a jury were charged with making a finding of fact but did not do so, the appellate court could not take the place of the jury and make findings of fact in its stead; similarly, if an administrative agency is charged with issuing an order, the court may not issue the administrative order in its stead. *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

Courts may not even substitute their judgments on administrative matter for those of the agency when conducting judicial review. *E.g., Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978) (Court may not substitute its judgment for that of agency as to

environmental consequences of proposed action); *Federal Communications Commission v. Schreiber*, 381 U.S. 279, 290-91 (1965) (Court may not establish administrative procedure *de novo*); *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17, 20-21 (1952) (Court may not modify terms of license issued by agency); *Public Service Commission v. Havemeyer*, 296 U.S. 506, 517-18 (1936) (Court may not substitute its own views for that of commission on revocation of a franchise).

Even if all of the parties involved want the Court to take on an administrative role, it may not do so. In *Vermont v. New York*, 417 U.S. 270 (1974) (per curiam), the parties proposed and the Master recommended a consent decree in which they sought appointment of a Special Master to rule on any contested matters that might arise in the execution of the decree. The Court declined to approve the decree because the Court, under Article III of the Constitution, may exercise only judicial power; and the Special Master's functions under the proposed decree might have no relation to the application of law or equity to facts. "Insofar as we would be supervising the execution of the Consent Decree, we would be acting more in an arbitral rather than a judicial manner." 417 U.S. at 277.

There is danger in courts exceeding their judicial power and absorbing legislative or administrative functions. Justice Marshall, when confronted with the difficult decision of whether to vacate a stay of a District Court decision enjoining United States air operations in Cambodia, observed:

> When the final history of the Cambodian war is written, it is unlikely to make pleasant reading. The decision to send American troops "to distant lands to die of foreign fevers and foreign shot and shell". . . may ultimately be adjudged to have been not only unwise but also unlawful.

> But the proper response to an arguably illegal action is not lawlessness by judges . . . . Down that road lies tyranny and repression.

Holtzman v. Schlesinger, 414 U.S. 1304, 1315 (1973). Similarly, Judge Holtzoff warned:

> We would be lacking in clarity of thought if we did not realize that such a development would transform the judiciary from a coordinate branch into a superior and all powerful organ of the government. The supreme power of the government would then be lodged in the Federal courts, composed of judges holding permanent tenure. Our government would cease to be a Republic.

Protestants and Other Americans United for Separation of Church and State v. O'Brien, 272 F. Supp. 712, 717 (D.D.C. 1967). The Court, therefore, restrains itself, acts as a check on its own power, and so ensures that ours is a government of limited powers.

Here the Court would be reaching well beyond its judicial powers under Article III of the Constitution if it discarded judicial review of Commission findings and proceeded, *de novo*, to make findings of fact delegated to the Commission. The interstate compact here authorizes the Commission, not the courts, to make administrative findings under the Compact. Articles V and VI. Making those findings is a function of engineering and hydrology, not law. The Court has neither the role nor special expertise to lend in making the administrative findings *de novo*. If the Court will not review the Commission's findings and may not make its own findings, it has no further function to perform and should return the matter to the Pecos River Commission.

If the Court does return the matter to the Commission, New Mexico will recommend to Texas that a mutually agreeable mediator be employed under Article V(c) of the Compact to assist the Commission in resuming its function. There is precedent for mediation under the Compact: Mr. Tipton, Chairman of the Engineering Advisory Committee, served the Commission well by mediating engineering disputes and differences from 1949 until his death in 1967. Moreover, mediation bears a good chance of success because the Commissioners associated with the litigation have left.[30] Therefore, if the matter is remanded to the Commission, New Mexico will propose this extra measure to enhance the likelihood of the Commission's success in turning from litigation to peaceful accommodation.

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[30]Texas Commissioner McGowen, who struck an independent path away from the joint work of the Commission and brought the states to this litigation, has been replaced. The New Mexico representative who served as Commissioner for most of the course of this litigation, resigned at the end of October, 1982.

CONCLUSION

The Master's recommendation that the Court grant voting power on the Pecos River Compact Commission to the federal representative or some other third party should be rejected because courts may not rewrite interstate compacts. Instead of foisting a third party tie-breaker on the Commission, the Court should proceed with judicial review of the Commission's findings. Alternatively, the Court should dismiss the case and allow the matter to return to the Commission.

Respectfully submitted,

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APPENDIX

PECOS RIVER COMPACT

The State of New Mexico and the State of Texas, acting through their Commissioners,

John H. Bliss for the State of New Mexico and
Charles H. Miller for the State of Texas,

after negotiations participated in by Berkeley Johnson, appointed by the President as the representative of the United States of America, have agreed respecting the uses, apportionment and deliveries of the water of the Pecos River as follows:

ARTICLE I

The major purposes of this Compact are to provide for the equitable division and apportionment of the use of the waters of the Pecos River; to promote interstate comity; to remove causes of present and future controversies; to make secure and protect present development within the states; to facilitate the construction of works for, (a) the salvage of water, (b) the more efficient use of water, and (c) the protection life and property from floods.

ARTICLE II

As used in this Compact:

(a) The term "Pecos River" means the tributary of the Rio Grande which rises in north-central New Mexico and flows in a southerly direction through New Mexico and Texas and joins the Rio Grande near the town of Langtry, Texas, and includes all tributaries of said Pecos River.

(b) The term "Pecos River Basin" means all of the contributing drainage area of the Pecos River and its tributaries above its mouth near Langtry, Texas.

(c) "New Mexico" and "Texas" means the State of New Mexico and the State of Texas, respectively; "United States" means the United States of America.

(d) The term "Commission" means the agency created by this Compact for the administration thereof.

(e) The term "deplete by man's activities" means to diminish the stream flow of the Pecos River at any given point as a result of beneficial consumptive uses of water within the Pecos River Basin above such point. For the purposes of this Compact it does not include the diminution of such flow by encroachment of salt cedars or other like growth, or by deterioration of the channel of the stream.

(f) The term "Report of the Engineering Advisory Committee" means that certain report of the Engineering Advisory Committee dated January, 1948, and all appendices thereto; including, basic data, processes, and analyses utilized in preparing that report, all of which were reviewed, approved, and adopted by the Commissioners signing this Compact at a meeting held in Santa Fe, New Mexico, on December 3, 1948, and which are included in the Minutes of that meeting.

(g) The term "1947 condition" means that situation in the Pecos River Basin as described and defined in the Report of the Engineering Advisory Committee. In determining any question of fact hereafter arising as to such situation, reference shall be made to, and decisions shall be based on, such report.

(h) The term "water salvaged" means that quantity of water which may be recovered and made available for beneficial use and which quantity of water under the 1947 condition was non-beneficially consumed by natural processes.

(i) The term "unappropriated flood waters" means water originating in the Pecos River Basin above Red Bluff Dam in Texas, the impoundment of which will not deplete the water usable by the storage and diversion facilities existing in either state under the 1947 condition and which if not impounded will flow past Girvin, Texas.

ARTICLE III

(a) Except as stated in paragraph (f) of this Article, New Mexico shall not deplete by man's activities the flow of the Pecos River at the New Mexico-Texas state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition.

(b) Except as to the unappropriated flood waters thereof, the apportionment of which is included in and provided for by paragraph (f) of this Article, the beneficial consumptive use of the waters of the Delaware River is hereby apportioned to Texas, and the quantity of such beneficial consumptive use shall be included in determining waters received under the provisions of paragraph (a) of this Article.

(c) The beneficial consumptive use of water salvaged in New Mexico through the construction and operation of a project or projects by the United States or by joint undertakings of Texas and New Mexico, is hereby apportioned forty-three per cent (43%) to Texas and fifty-seven per cent (57%) to New Mexico.

(d) Except as to water salvaged, apportioned in paragraph (c) of this Article, the beneficial consumptive use of water which shall be non-beneficially consumed, and which is recovered, is hereby apportioned to New Mexico but not to have the effect of diminishing the quantity of water available to Texas under the 1947 condition.

(e) Any water salvaged in Texas is hereby apportioned to Texas.

(f) Beneficial consumptive use of unappropriated flood waters is hereby apportioned fifty per cent (50%) to Texas and fifty per cent (50%) to New Mexico.

ARTICLE IV

(a) New Mexico and Texas shall cooperate to support legislation for the authorization and construction of projects to eliminate non-beneficial consumption of water.

(b) New Mexico and Texas shall cooperate with agencies of the United States to devise and effectuate means of alleviating the salinity conditions of the Pecos River.

(c) New Mexico and Texas each may:

(i) Construct additional reservoir capacity to replace reservoir capacity made unusable by any cause.

(ii) Construct additional reservoir capacity for utilization of water salvaged and appropriated flood water apportioned by this Compact to such state.

(iii) Construct additional reservoir capacity for the purpose of making more efficient use of water apportioned by this Compact to such state.

(d) Neither New Mexico nor Texas will oppose the construction of any facilities permitted by this Compact, and New Mexico and Texas will cooperate to obtain the construction of facilities that will be of joint benefit to the two states.

(e) The Commission may determine the conditions under which Texas may store water in works constructed in and operated by New Mexico.

(f) No reservoir shall be constructed and operated in New Mexico above Avalon Dam for the sole benefit of Texas unless the Commission shall so determine.

(g) New Mexico and Texas each has the right to construct and operate works for the purpose of preventing flood damage.

(h) All facilities shall be operated in such manner as to carry out the terms of this Compact.

ARTICLE V

(a) There is hereby created an interstate administrative agency to be known as the "Pecos River Commission." The Commission shall be composed of one Commissioner representing each of the states of New Mexico and Texas, designated or appointed in accordance with the laws of each such state, and, if designated by the President, one Commissioner representing the United States. The President is hereby requested to designate such a Commissioner. If so designated, the Commissioner representing the United States shall be the presiding officer of the Commission, but shall not have the right to vote in any of the deliberations of the Commission. All members of the Commission must be present to constitute a quorum.

(b) The salaries and personal expenses of each Commissioner shall be paid by the government which he represents. All other expenses which are incurred by the Commission incident to the administration of this Compact and which are not paid by the United States shall be borne equally by the two states. On or before November 1 of each even numbered year the Commission shall adopt and transmit to the Governors of the two states and to the President a budget covering an estimate of its expenses for the following two years. The payment of the expenses of the Commission and of its employees shall not be subject to the audit and accounting procedures of either of the two states. However, all receipts and disbursements of funds handled by the Commission shall be audited yearly by a qualified independent public accountant and the report of the audit shall be included in, and become a part of, the annual report of the Commission.

(c) The Commission may appoint a secretary who, while so acting, shall not be an employee of either state. He shall serve for such term, receive such salary, and perform such duties as the Commission may direct. The Commission may employ such engineering, legal, clerical, and other personnel as in its judgment may be necessary for the performance of its functions under this Compact. In the hiring of employees the Commission shall not be bound by the civil service laws of either state.

(d) The Commission, so far as consistent with this Compact, shall have power to:

1. Adopt rules and regulations;

2. Locate, establish, construct, operate, maintain, and abandon water gaging stations, independently or in cooperation with appropriate governmental agencies;

3. Engage in studies of water supplies of the Pecos River and its tributaries, independently or in cooperation with appropriate governmental agencies;

4. Collect, analyze, correlate, preserve and report on data as to the stream flows, storage, diversions, salvage, and use of the waters of the Pecos River and its tributaries, independently or in cooperation with appropriate governmental agencies;

5. Make findings as to any change in depletion by man's activities in New Mexico, and on the Delaware River in Texas;

6. Make findings as to the deliveries of water at the New Mexico-Texas state line;

7. Make findings as to the quantities of water salvaged and the amount thereof delivered at the New Mexico-Texas state line;

8. Make findings as to quantities of water non-beneficially consumed in New Mexico;

9. Make findings as to quantities of unappropriated flood waters;

10. Make findings as to the quantities of reservoir losses from reservoirs constructed in New Mexico which may be used for the benefit of both states, and as to the share thereof charged under Article VI hereof to each of the states;

11. Acquire and hold such personal and real property as may be necessary for the performance of its duties hereunder and to dispose of the same when no longer required;

12. Perform all functions required of it by this Compact and do all things necessary, proper or convenient in the performance of its duties hereunder, independently or in cooperation with appropriate governmental agencies;

13. Make and transmit annually to the Governors of the signatory states and to the President of the United States on or before the last day of February of each year, a report covering the activities of the Commission for the preceding year.

(e) The Commission shall make available to the Governor of each of the signatory states any information within its possession at any time, and shall always provide free access to its records by the Governors of each of the States, or their representatives, or authorized representatives of the United States.

(f) Findings of fact made by the Commission shall not be conclusive in any court, or before any agency or tribunal, but shall constitute prima facie evidence of the facts found.

(g) The organization meeting of the Commission shall be held within four months from the effective date of this Compact.

ARTICLE VI

The following principles shall govern in regard to the apportionment made by Article III of this Compact:

(a) The report of the Engineering Advisory Committee, supplemented by additional data hereafter accumulated, shall be used by the Commission in making administrative determinations.

(b) Unless otherwise determined by the Commission, depletions by man's activities, state-line flows, quantities of

water salvaged, and quantities of unappropriated flood waters shall be determined on the basis of three-year periods reckoned in continuing progressive series beginning with the first day of January next succeeding the ratification of this Compact.

(c) Unless and until a more feasible method is devised and adopted by the Commission the inflow-outflow method, as described in the Report of the Engineering Advisory Committee, shall be used to:

(i) Determine the effect on the state-line flow of any change in depletions by man's activities or otherwise, of the waters of the Pecos River in New Mexico.

(ii) Measure at or near the Avalon Dam in New Mexico the quantities of water salvaged.

(iii) Measure at or near the state line any water released from storage for the benefit of Texas as provided for in sub-paragraph (d) of this Article.

(iv) Measure the quantities of unappropriated flood waters apportioned to Texas which have not been stored and regulated by reservoirs in New Mexico.

(v) Measure any other quantities of water required to be measured under the terms of this Compact which are susceptible of being measured by the inflow-outflow method.

(d) If unappropriated flood waters apportioned to Texas are stored in facilities constructed in New Mexico, the following principles shall apply:

(i) In case of spill from a reservoir constructed in and operated by New Mexico, the water stored to the credit of Texas will be considered as the first water to spill.

(ii) In case of spill from a reservoir jointly constructed and operated, the water stored to the credit of either state shall not be affected.

(iii) Reservoir losses shall be charged to each state in proportion to the quantity of water belonging to that State in storage at the time the losses occur.

(iv) The water impounded to the credit of Texas shall be released by New Mexico on the demand of Texas.

(e) Water salvaged shall be measured at or near the Avalon Dam in New Mexico and to the quantity thereof shall be added a quantity equal to the quantity of salvaged water depleted by man's activities above Avalon Dam. The quantity of water salvaged that is apportioned to Texas shall be delivered by New Mexico at the New Mexico-Texas state line. The quantity of unappropriated flood waters impounded under paragraph (d) of this Article, when released shall be delivered by New Mexico at the New Mexico-Texas state line in the quantity released less channel losses. The unappropriated flood waters apportioned to Texas by this Compact that are not impounded in reservoirs in New Mexico shall be measured and delivered at the New Mexico-Texas state line.

(f) Beneficial use shall be the basis, the measure, and the limit of the right to use water.

ARTICLE VII

In the event of importation of water by man's activities to the Pecos River Basin from any other river basin the state making the importation shall have the exclusive use of such imported water.

ARTICLE VIII

The provisions of this Compact shall not apply to, or interfere with, the right or power of either signatory state to regulate within its boundaries the appropriation, use and control of water, not inconsistent with its obligations under this Compact.

ARTICLE IX

In maintaining the flows at the New Mexico-Texas state line required by this Compact, New Mexico shall in all instances apply the principle of prior appropriation within New Mexico.

ARTICLE X

The failure of either state to use the water, or any part thereof, the use of which is apportioned to it under the terms of this Compact, shall not constitute a relinquishment of the right to such use, nor shall it constitute a forfeiture or abandonment of the right to such use.

ARTICLE XI

Nothing in this Compact shall be construed as:

(a) Affecting the obligations of the United States under the Treaty with the United Mexican States (Treaty Series 994);

(b) Affecting any rights or powers of the United States, its agencies or instrumentalities, in or to the waters of the Pecos River, or its capacity to acquire rights in and to the use of said waters;

(c) Subjecting any property of the United States, its agencies or instrumentalities, to taxation by any state or subdivision

thereof, or creating any obligation on the part of the United States, its agencies or instrumentalities, by reason of the acquisition, construction or operation of any property or works of whatever kind, to make any payment to any state or political subdivision thereof, state agency, municipality or entity whatsoever, in reimbursement for the loss of taxes;

(d) Subjecting any property of the United States, its agencies or instrumentalities, to the laws of any state to an extent other than the extent to which such laws would apply without regard to this Compact.

ARTICLE XII

The consumptive use of water by the United States or any of its agencies, instrumentalities or wards shall be charged as a use by the state in which the use is made; provided, that such consumptive use incident to the diversion, impounding, or conveyance of water in one state for use in the other state shall be charged to such latter state.

ARTICLE XIII

This Compact shall not be construed as establishing any general principle or precedent applicable to other interstate streams.

ARTICLE XIV

This Compact may be terminated at any time by appropriate action of the legislatures of both of the signatory states. In the event of such termination, all rights established under it shall continue unimpaired.

ARTICLE XV

This Compact shall become binding and obligatory when it shall have been ratified by the legislature of each State and approved by the Congress of the United States. Notice of ratification by the legislature of each State shall be given by the Governor of that State to the Governor of the other State and to the President of the United States, and the President is hereby requested to give notice to the Governor of each State of approval by the Congress of the United States.

IN WITNESS WHEREOF, the Commissioners have executed three counter-parts hereof each of which shall be and constitute an original, one of which shall be deposited in the archives of the Department of State of the United States, and one of which shall be forwarded to the Governor of each State.

Done at the City of Santa Fe, State of New Mexico, this 3rd day of December, 1948.

JOHN H. BLISS
Commissioner for the State of New Mexico

CHARLES H. MILLER
Commissioner for the State of Texas

APPROVED

BERKELEY JOHNSON
Representative of the United States of America

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FILED
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ALEXANDER L. STEVAS,
CLERK

NO. 65, ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

• • •

STATE OF TEXAS,

Plaintiff

V.

STATE OF NEW MEXICO,

Defendant

UNITED STATES OF AMERICA,

Intervenor

TEXAS EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER AND BRIEF IN SUPPORT THEREOF

• • •

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No. 65, Original

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

STATE OF TEXAS, *Plaintiff*

V.

STATE OF NEW MEXICO, *Defendent*

UNITED STATES OF AMERICA, *Intervenor*

EXCEPTIONS TO THE REPORT AND RECOMMENDATIONS OF THE SPECIAL MASTER

Comes now the State of Texas to accept the Special Master's recommendations that the United States representative on the Pecos River Commission be vested with power to participate and act in all Commission deliberations and to vote to resolve any impasse created by failure of the representatives of Texas and New Mexico to agree, that the Pecos River Commission should then perform its duties, and that the Court retain jurisdiction of the case. However, if the Court decides not to accept these recommendations of the Special Master, Texas excepts to the report of the Special Master accepted for filing on October 18, 1982, as follows:

1. Texas objects to the Master's conclusion that the continuation of the suit is beyond the judicial function.

2. Texas objects to the Master's conclusion that the Texas motion to substitute double mass analysis for river routing should be denied.

WHEREFORE, the State of Texas prays that the Court accept the Special Master's recommendation that the United States representative on the Pecos River Commission be vested with power to participate and act in all Commission deliberations and to vote to resolve any impasse created by failure of the representatives of Texas and New Mexico to agree, that having vested the United States representative with the power to vote to resolve any impasse, the States be ordered to return to the Pecos River Commission for performance by it of its duties, and that the Court retain jurisdiction of the case. In the alternative, if the Court does not accept the above-mentioned recommendations, the State of Texas prays that the Court grant the Texas motion to substitute the double mass analysis for the river routing and remand the case with instructions to make the necessary determinations to conclude the law suit.

Respectfully submitted,

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No. 65, Original

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

STATE OF TEXAS, *Plaintiff*

V.

STATE OF NEW MEXICO, *Defendant*

UNITED STATES OF AMERICA, *Intervenor*

BRIEF IN SUPPORT OF EXCEPTIONS

QUESTIONS PRESENTED

The alternative exceptions of the State of Texas will address the following questions:

1. Whether the continuation of the lawsuit is within the judicial functions.

2. Whether the double mass analysis should be substituted for river routing as the inflow-outflow method to determine the base relationship depicting the 1947 condition.

JURISDICTION

The original jurisdiction of the Court was invoked under Article III, Section 2, Clause 2 of the United States Constitution and 28 U.S.C. §1251(a)(1).

PECOS RIVER COMPACT

The rights of Texas and New Mexico equitably dividing and apportioning the waters of the Pecos River, an interstate river which rises in North Central New Mexico and flows in a southerly direction through New Mexico and Texas, are set forth in the Pecos River Compact of 1948, ratified and approved by Act of Congress, Senate Document 109, 81st Congress, 1st Session 1949, 63 Stat. 159 (1949). A copy of the Compact is appended as Appendix A.

STATEMENT OF THE CASE

The Special Master's report fairly states the nature of the case and the facts that are material to the consideration of the questions presented. There are a few matters that Texas believes need further discussion, however.

In the History of Litigation section of the Report at p. 10, the Master correctly states that Texas submitted the report of Drs. Charnes and Heaney which recommended the use of the double mass analysis to determine the base relationship for the 1947 condition. Master's Exhibit 20(b). Texas did not state its position concerning the ¶4(b) issues, which related to the river routing method, because the double mass analysis is an inflow-outflow method which is not as dependent on an individual's judgment as is the river routing method. The Texas submission was in response to the Master's statements that some other method of accounting under the Compact should be considered. See Tr. vol. XXXIII, pp. 3277-3280.

In the Factual Issues section of the Report at p. 13, the Master discusses the "water budget" method which is used in river routing for computation of unmeasured values. The Master correctly states that the results may be a "residual negative, i.e., a minus flow which is

impossible of occurrence in a state of nature." However, during the March 8-16 hearing, Texas clearly stated its position that when a residual negative occurs in a flood inflow computation, it should be set at zero unless the residual negative is caused by lag time[1] in which case the minus number should be carried forward. See Texas Exhibit 62 and Texas Exhibit 48 at pp. 3, 5, 22 and 31, Tr. vols. XLI, pp. 3975-3976, and XLII, pp. 4151-4152.

Texas disagrees with the Master's statement at p. 20 of the Report that "Texas and New Mexico say that if the case is to proceed, the next step should be the determination of the ¶4(b) issues." New Mexico has said that the ¶4(b) issues should be determined. However, Texas did not object to the Master's order of December 29, 1981, vacating the ¶4(b) portion of the 1977 Pre-Trial Order. Texas says that if the case proceeds, the next step is to determine the base relationship depicting the 1947 condition and that the double mass analysis method, Texas Exhibit 41, should be used. In the event the double mass analysis method is not used, Texas has proposed a river routing method to be used. Texas Exhibit 48. New Mexico responded to Texas' river routing proposal in its Statement Regarding Basic Facts, Unmeasured Values and Techniques for Determining Stream Flows. New Mexico Exhibit 54. New Mexico substantially agrees to the Texas proposal, but disagreements between the states still remain in certain areas. See New Mexico Exhibit 54, pp. 8-14 and Tr. vol. XLII, pp. 4194-4243. These disputes need to be resolved by the Court in order to depict the 1947 condition by river routing.

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[1]Lag time is the fact that releases, irrigation returns, or flood inflows are in transit between an upstream and downstream gage when the gage flows are recorded and used in the computations. See Tr. vol. XLII, pp. 4145-4146.

SUMMARY OF ARGUMENT

The Pecos River Commission is not a federal agency. Since the Commission is not a federal agency, the Court is not limited to the scope of review provisions of 5 U.S.C. §706. The Compact creates federal rights in the compacting States. In this action, Texas is seeking enforcement of her rights under the Compact. Enforcement of these rights is a judicial function.

It is within the Court's jurisdiction to construe the Compact, to determine whether there has been a breach of the Compact obligation, and to issue a judgment to remedy any breach regardless of Commission action or inaction. Commission determinations and findings under Arts. V and VI are not conclusive in any court but are prima facie evidence of the facts found which may be rebutted or contradicted. In the absence of Commission action, the Court is deprived of prima facie evidence. The Court may exercise its independent judgment in resolving the disputes without invading the discretion of the Commission.

The Court's decree would not be advisory. Rather, the Court can render an effective decree by ordering the States to conduct their activities in accordance with the Court's construction of the Compact and to remedy any breach that is found. Such a decree would be binding on the States and their representatives on the Pecos River Commission.

The Court has partially construed the Compact by defining the 1947 condition. It is within the Court's power to use the double mass analysis method to define the 1947 condition quantitatively since it is an inflow-outflow method.

ARGUMENT

1. Continuation of the Suit

The Master has concluded that "further progress in this case will require him, and the Court, to perform administrative duties and exercise administrative powers delegated to the agency created by the Compact" and that "such exercise of administrative power is beyond the judicial function." Master's 1982 Report, p. 27. Texas excepts to this conclusion. It is clearly within the Court's power and is clearly a judicial function to construe interstate compacts consented to by Congress. *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951).

In this suit to enforce the Pecos River Compact, Texas is asking the Court to determine whether New Mexico has been making deliveries of water at the New Mexico-Texas state line in accordance with her Compact obligation. Because the Compact creates an interstate administrative agency, the Pecos River Commission, and delegates to the Commission the power to make findings concerning state line deliveries, changes in depletion by man's activities in New Mexico, and quantities of water non-beneficially consumed in New Mexico, Art. V(a) and (d), the Master believes that the Court cannot make similar findings in the absence of Commission finding in this suit to enforce the Compact. Texas believes the contrary.

Texas agrees with the Master's conclusions, and his reasons therefor, that the Commission is not a federal agency. Master's 1982 Report, p. 17. Since the Commission is not a federal agency, the judiciary, and this Court specifically, is not limited by 5 U.S.C. §706 and the cases construing it. Since 5 U.S.C. §706 is not applicable, we must look to the Compact to see what the scope of review is and what limits, if any, are imposed on the judiciary. Art. V(f) states that "[f]indings of fact made by the Commission shall not be conclusive in any court, or before any agency or tribunal, but shall constitute prima facie evidence of the facts found." Commission findings, if any, constitute prima facie evidence

and as such, can be contradicted or rebutted. Further, the Compact in no way makes the fact-finding power of the Commission exclusive. Implicit in Art. V(f) is the understanding of the parties to the Compact that the Court will enforce the Compact.

The Compact has created federal rights in the compacting states since the Compact is "a law of the United States," *Cuyler v. Adams*, 449 U.S. 433, 438 (1981). Texas is seeking enforcement of her rights under the Compact in this action. Enforcement of these rights is a judicial function, even though in this action such enforcement requires the Court to resolve factual and policy disputes delegated to, but unresolved by, the Commission. Judicial inaction would preclude the only effective remedy Texas has to protect her rights under the Compact. Commission action should not be a prerequisite to judicial relief. If that were the case, Commission inaction would prevent the Court from exercising its jurisdiction to protect federal rights under the Compact. *See Green v. Biddle*, 8 Wheat (21 U.S.) 1, 90-91 (1823) and *British Airways Board v. Port of Authority of New York and New Jersey*, 564 F.2d 1002, 1010 (2d Cir. 1977).

In *Green v. Biddle, supra*, this Court construed a compact between Virginia and Kentucky which provided for the creation of a special tribunal for the resolution of disputes about the interpretation and execution of the compact. It was argued that the Court has no jurisdiction to construe the compact because the compact had created a tribunal to do so. In reply to this argument the Court said:

> How, then, are those controversies ... to be settled? The answer, we presume, would be, by Commissioners, to be appointed by those States. But none such have been appointed; what then? Suppose either of

> those States, Virginia for example, should refuse to appoint Commissioners? Are the occupants of lands, to which they have no title, to retain their possessions until this tribunal is appointed, and to enrich themselves, in the mean time, by the profits of them, not only to the injury of non-residents, but of the citizens of Kentucky? The supposition of such a state of things is too monstrous to be for a moment entertained. The best feelings of our nature revolt against a construction which leads to it.

Id. at 90-91. Such would be the result in this case if the Court does not have the jurisdiction to enforce the Compact by resolving the remaining disputes between the States through continuation of the suit.

In his report, the Master concluded that continuation of the suit is not within the judicial function because it would require the Court to perform administrative duties and exercise administrative powers delegated to the Commission. The Master cites *Federal Radio Commission v. General Electric Company,* 281 U.S. 464, 469 (1930), for the proposition that the Court cannot "exercise or participate in the exercise of function which are essentially ... administrative" and cites *Federal Communications Commission v. Schrieber,* 381 U.S. 279, 290-291 (1965) for the proposition that the Court cannot establish administrative procedures *de novo.* Both cases are inapplicable to the present controversy.

This court has held repeatedly that the Constitution forbids Article III courts from exercising administrative functions, but it has never clearly defined the difference between judicial and administrative functions. *Federal Radio Commission v. General Electric Company, supra,* involved facts which today might be held to present a judicial question. *Federal Communica-*

tions Commission v. Schrieber, supra, stands for the principle that agencies must be allowed to create their own rules of procedure with as little judicial interference as possible. Texas does not dispute this conclusion, but finds it inapposite here.

Federal Radio involved the Federal Radio Act, which instructed the District of Columbia Court of Appeals to review the decision of the Federal Radio Commission by taking additional evidence and making such order as might seem just. This Court held that such a review was an administrative function. It was permissible for the Court of Appeals to sit as a superior administrative agency since the Court of Appeals was a legislative court. The Court held that the Supreme Court could not review the Court of Appeals decision because Article III of the Constitution prevents it from performing administrative functions. However, *Federal Radio* neither provides a rule to distinguish administrative from judicial functions nor does it stand for the proposition that courts may not be instructed to redo completely the work of an administrative agency. *See,* Wright, Miller & Cooper, *Federal Practice and Procedure*: Jurisdiction §3535.

This suit is not seeking review of agency action or procedures, rather it is seeking enforcement of Compact obligations. The Compact contemplates judicial enforcement of the Compact. Art. V(f). Admittedly, there has been no action by the Pecos River Commission concerning Compact obligations since 1961, but Commission findings are only prima facie evidence of the facts found. Art. V(f). This suit is more analogous to the situation in *United States v. First City National Bank of Houston,* 386 U.S. 361 (1967) where the Court held that the findings of the Comptroller of the Currency under the Bank Merger Act of 1966 were not binding on the Court in an antitrust action under the Clayton Act. The Bank Merger Act permitted the comptroller to approve a merger which would lessen competition if he found

that the anti-competitive effects of the proposed merger were outweighed by the probable effect of the transaction in meeting the convenience and need of the community. The comptroller had made such finding and approved the merger. The Bank Merger Act provided that in a judicial proceeding attacking a merger on the grounds that it violated the antitrust laws, a court would apply the same standards as the banking agency would and further, that the court would review *de novo* the issues presented. *Id.* at 363-365.

The Court saw the problem presented as one of determining whether the comptroller's decision was one in the category of other administrative rulings which are sustained unless the agency's action is not supported by substantial evidence. *Id.* at 366-367. The Court found that it was not because the statutory language does not express the conventional standard, the comptroller's action was informal, i.e., no hearings, and the court's judgment finally determines whether the merger is legal. *Id.* at 368-369. The rule of the *First City National Bank* case is that the Court may apply the same standards and make similar findings that an administrative agency makes when the Court is making a judicial determination and when the statute does not make the agency findings conclusive unless unsupported by substantial evidence.

In this case, the Compact does not express any intent that the findings of the Commission should be upheld unless they are not supported by substantial evidence. The Compact does not provide for any formal adjudicatory hearing procedure. The commission is not vested with any enforcement powers. The Compact contemplates that any enforcement of the Compact will be by the courts. Art. V(f). Compact construction, interpretation, and enforcement are within the jurisdiction of this Court. *West Virginia ex rel. Dyer v. Sims, supra.* For these reasons, the Compact's grant of fact-

finding power to the Commission does not preclude the Court from making similar determinations in a suit to enforce Compact obligations.

In the absence of a clear dividing line between administrativie and judicial functions, the Court must decide on policy grounds which cases present questions that are appropriately settled by courts. Texas submits that the present dispute is especially well suited for resolution by the Court. This case presents questions of the construction of a compact. Construction of a compact is a familiar judicial function. It is true that these proceedings involve complex matters of fact. So do other types of cases for which this Court has shouldered the duty to decide, e.g., equitable apportionment of streams, antitrust litigation, or the oversight of the drawing of legislative districts. But without recourse to this Court, Texas and New Mexico have no forum to decide this dispute.

The other problem that the Master expressed concerning the continuation of the law suit is the Court's decree. The Master believes that any decree of the Court resolving the dispute could be subverted by Commission action or the one-state veto which would make the Court's decree advisory. Master's 1982 Report, pp. 21-22. Texas disagrees with the Master's conclusion. Article III of the United States Constitution provides that the judicial power of the United States extends to controversies between two or more states and gives the Supreme Court original jurisdiction of cases between states. The Court has the power to determine the nature and scope of compact obligations as between states, *West Virginia ex rel. Dyer v. Sims*, 341 U.S. at 28. The jurisdiction of actions between states includes the power to enforce any judgment that may be entered. The Court may fashion appropriate remedies, even though their exertion may operate upon governmental powers of the state. *Virginia v. West Virginia*, 246 U.S. 565 (1918). The Court has announced

its power to enforce its judgments, but it has trusted the states to comply with their constitutional duty to act in accordance with its judgments. *Id.; Wyoming v. Colorado,* 309 U.S. 572 (1940).

The Court's judgment will be binding on the States and their representatives. The Court's construction of the Compact would be the law of the land until Congressional action to the contrary. We presume that the States will abide by the judgment in good faith. The Commission would be required to exercise its duties in accordance with the Court's construction of the Compact at a matter of law. There is no reason to believe that the Commission will not abide by the Court's construction.

The Commission would be able to exercise its other powers and duties. Art. V. One-state veto could not be used to subvert yearly accounting because the Court's decree would be controlling until the Commission could agree to other methods or to an alternative to the inflow-outflow method. Art. VI(c). The decree would insure action whenever the Commission is deadlocked.

2. Denial of the Texas Motion to Substitute Double Mass Analysis for River Routing

In order to determine whether New Mexico has met her Compact obligation, Art. III(a), the Court needs to implement the Master's definition of the 1947 condition, which was affirmed by the Court. 446 U.S. 540. As the Master said, "The legal definition must be translated into water quantities to provide a numerical standard for measurement of compliance." Master's 1982 Report, p. 1. The 1947 condition river routing study contained in the Report of the Engineering Advisory Committee, S.D. 109, cannot be used because it contains errors. Master's 1979 Report, p. 41. Texas has proposed the use of the double mass analysis method to

translate the water quantities into a numerical standard. *See,* Texas' Motion to Use the Double Mass Inflow-Outflow Method and Texas Exhibit 41.

The Master has repeatedly expressed his concern about the use of a river operation or river routing study to determine the base inflow because such a study requires many engineering judgments which can result in good faith differences of opinion. Tr. vols. XXXIII, pp. 3270 and 3277-3280, and XXXIV, pp. 3299-3301. In response to the Master's concerns, Texas urges the use of the double mass analysis to quantitatively define the 1947 condition because it is accurate and eliminates the computation of unmeasured values and the utilization of judgment dependent techniques which are necessary in the river routing methold. *See* Texas Exhibit 41, pp. 1-5. During the March 8-16, 1982, hearings, Texas presented the testimony of Drs. Heaney and Charnes to explain the Texas double mass analysis proposal and New Mexico offered rebuttal testimony. *See* Tr. vols. XXXVIII, XXXIX, and XL, pp. 3808-3940. After hearing this testimony, the Master has concluded that the double mass analysis is an "accounting procedure usable in the administration of the inflow-outflow method." Master's 1982 Report, p. 14. However, because the engineering advisors to the Compact negotiators were concerned about the use of an allocation of water on a straight-line percentage basis, the Master has denied Texas' motion to substitute double mass analysis for river routing. Master's 1982 Report, p. 21.

The Master quotes the following from the Report of Engineering Advisory Committee, S.D. 109, pp. XXXIII-XXXIV:

> A compact based on an *allocation* of water on a straight-line percentage is not feasible or practical. The flow of water at any point in a given stream, under natural condi-

> tions, does not bear a straight-line relation to the inflow to the stream above that point. (Emphasis added)

In determining the base relationship, two questions need to be addressed. First, what proportion of the Pecos River flow is Texas entitled to under the 1947 level of development? This relates to the obligation. Second, what are the annual delivery requirements of New Mexico to Texas? This relates to allocation.

The first question concerns the long-term compact obligation under a wide variety of hydrologic conditions that could be expected during the next 50 to 100 years. The double mass analysis addresses this question. The results of the study indicates that Texas is entitled, on the average to 1.22 times the flow at Alamagordo (Sumner) gage. Texas Exhibit 41, pp. 27-34 and Fig. 17. In other words, this calculation establishes the long-term obligation to provide water. For example and for illustrative purposes, the compact obligation could require New Mexico to deliver an average of 100,000 acre feet per year for the next 50 years or a total obligation of 5,000,000 acre feet over this 50 year period.

Given the answer to the first question, using the example, we know that New Mexico must average 100,000 acre feet per year. The second question, which concerns allocation, is analogous to financial analysis in that we are trying to find a mutually agreeable payment plan. The simple payment plan is that New Mexico provides 100,000 acre feet per year. However, as the engineers correctly point out in the same section from which the above quote is taken, the inflow-outflow relation is an exponential one. Report of Engineering Advisory Committee, S.D. 109, p. XXXIV. Therefore, a uniform delivery requirement may cause a hardship on the upstream state because it would force the state to

construct reservoirs to satisfy the delivery schedule. Consequently, it would be preferable to vary the annual delivery requirement based on the observed flow, i.e., low delivery in low flow years and high delivery in high flow years. This is precisely what Texas is suggesting by introducing the curve into the relationship. *See* Texas Exhibit 41, pp. 36-42 and Fig. 19. Texas has addressed the concerns of the engineer advisors and proposes an allocation based on a curvilinear basis rather than a straight-line percentage. Whatever the answer to the second question is, it does not affect the answer to the first question. The Master does not separate these questions. Consequently, the Master criticizes the double mass analysis incorrectly.

If the Court affirms the Master's conclusion that the double mass analysis is an accounting procedure which can be used in the inflow-outflow method, there is no question that the Court can substitute the double mass analysis for river routing. The Court has affirmed the Master's conclusion in his 1979 Report that "neither the 1947 routing study nor any other portion of the various engineering reports, appendices, and supplements" can be used to determine the depletion of the stream by New Mexico. Master's 1979 Report, p. 41; 446 U.S. 540.

These reports, appendices, and supplements are nullities for the purposes of determining the 1947 condition base relationship under the inflow-outflow method. This void can be filled by the Court's utilization of the double mass analysis to depict the 1947 condition base relationship. The double mass analysis is accurate and eliminates the computation of the many unmeasured values and the selection of techniques that is required by river routing. The engineering judgments associated with these computations and selections have caused the dispute between the States and their disagreement has resulted in this lawsuit. The double mass analysis is not a cure-all but is a major step

in the elimination of potential areas of dispute. For these reasons, Texas urges the Court overrule the Master's denial of the Texas motion to substitute the double mass analysis for river routing.

CONCLUSION

For the reasons stated above, the State of Texas respectfully disagrees with the Master's conclusions that continuation of the suit is not within the judicial function and that the Texas motion to substitute the double mass analysis for river routing should be denied. This is a suit to enforce the Compact, not to review Commission findings. It is clearly within the jurisdiction of the Court to enforce the Compact even if it requires the Court to make findings which would ordinarily be made by the Commission and as such would be prima facie evidence in any court. The Court's decree would be binding on the parties and their representatives, including the Compact Commissioners.

Use of the double mass analysis is authorized by the Compact as it is a means of accounting under the inflow-outflow method. Double mass analysis should be used to depict the 1947 condition because it is accurate and eliminates judgment dependent computations and decisions which are necessary in the river routing method.

In the event the Court does not accept the Master's recommendations concerning the U.S. Commissioner's power to vote in Commission deliberations, Texas respectfully requests that the Court remand the case to the Special Master for continuation of the lawsuit with instructions to use the double mass analysis, as proposed by Texas, to depict the 1947 condition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, R. Lambeth Townsend, attorney for the State of Texas, plaintiff herein, and a member of the bar of the United States Supreme Court, certify that on this the ____ day of _____, 1982, I served copies of the foregoing by U.S. mail, postage prepaid, to counsel for New Mexico and the United States.

_____

R. Lambeth Townsend
Assistant Attorney General

APPENDIX A

PECOS RIVER COMPACT
(63 Stat. 159, 160-165)

The State of New Mexico and the State of Texas, acting through their Commissioners, John H. Bliss for the State of New Mexico and Charles H. Miller for the State of Texas, after negotiations participated in by Berkeley Johnson, appointed by the President as the representative of the United States of America, have agreed respecting the uses, apportionment and deliveries of the water of the Pecos River as follows:

ARTICLE I

The major purposes of this Compact are to provide for the equitable division and apportionment of the use of the waters of the Pecos River; to promote interstate comity; to remove causes of present and future controversies; to make secure and protect present development within the states; to facilitate the construction of works for, (a) the salvage of water, (b) the more efficient use of water, and (c) the protection of life and property from floods.

ARTICLE II

As used in this Compact:

(a) The term "Pecos River" means the tributary of the Rio Grande which rises in north-central New Mexico and flows in a southerly direction through New Mexico and Texas and joins the Rio Grande near the town of Langtry, Texas, and includes all tributaries of said Pecos River.

(b) The term "Pecos River Basin" means all of the contributing drainage area of the Pecos River and its tributaries above its mouth near Langtry, Texas.

(c) "New Mexico" and "Texas" mean the State of New Mexico and the State of Texas, respectively; "United States" means the United States of America.

(d) The term "Commission" means the agency created by this Compact for the Administration thereof.

(e) The term "deplete by man's activities" means to diminish the stream flow of the Pecos River at any given point as the result of benificial consumptive uses of water within the Pecos River Basin above such point. For the purposes of this Compact it does not include the diminution of such flow by encroachment of salt cedars or other like growth, or by deterioration of the channel of the stream.

(f) The term "Report of the Engineering Advisory Committee" means that certain report of the Engineering Advisory Committee dated January, 1948, and all appendices thereto; including, basic data, processes, and analyses utilized in preparing that report, all of which were reviewed, approved, and adopted by the Commissioners signing this Compact as a meeting held in Santa Fe, New Mexico, on December 3, 1948, and which are included in the Minutes of that meeting.

(g) The term"1947 condition" means that situation in the Pecos River Basin as described and defined in the Report of the Engineering Advisory Committee. In determining any question of fact hereafter arising as to such situation, reference shall be made to, and decisions shall be based on, such report.

(h) The term "water salvaged" means that quantity of water which may be recovered and made available for beneficial use and which quantity of water under the 1947 condition was non-beneficially consumed by natural processes.

(i) The term "unappropriated flood waters" means water originating in the Pecos River Basin above Red Bluff Dam in Texas, the impoundment of which will not deplete the water usable by the storage and diversion facilities existing in either state under the 1947 condition and which if not impounded will flow past Girvin, Texas.

ARTICLE III

(a) Except as stated in paragraph (f) of this Article, New Mexico shall not deplete by man's activities the flow of the Pecos River at the New Mexico-Texas state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition.

(b) Except as to the unappropriated flood waters thereof, the apportionment of which is included in and provided for by paragraph (f) of this Article, the beneficial consumptive use of the waters of the Delaware River is hereby apportioned to Texas, and the quantity of such beneficial consumptive use shall be included in determining waters received under the provisions of paragraph (a) of this Article.

(c) The beneficial consumptive use of water salvaged in New Mexico through the construction and operation of a project or projects by the Unted States or by joint undertakings of Texas and New Mexico, is hereby apportioned forty-three per cent (43%) to Texas and fifty-seven per cent (57%) to New Mexico.

(d) Except as to water salvaged, apportioned in paragraph (c) of this Article, the benefical consumptive use of water which shall be non-beneficially consumed, and which is recovered, is hereby apportioned to New Mexico but not to have the effect of diminishing the quantity of water available to Texas under the 1947 condition.

(e) Any water salvaged in Texas is hereby apportioned to Texas.

(f) Beneficial consumptive use of unappropriated flood waters is hereby apportioned fifty per cent (50%) to Texas and fifty per cent (50%) to New Mexico.

ARTICLE IV

(a) New Mexico and Texas shall cooperate to support legislation for the authorization and construction of projects to eliminate non-beneficial consumption of water.

(b) New Mexico and Texas shall cooperate with agencies of the United States to devise and effectuate means of alleviating the salinity conditions of the Pecos River.

(c) New Mexico and Texas each may:

(i) Construct additional reservoir capacity to replace reservoir capacity made unusable by any cause.

(ii) Construct additional reservoir capacity for the utilization of water salvaged and unappropriated flood waters apportioned by this Company [sic] to such state.

(iii) Construct additional reservoir capacity for the purpose of making more efficient use of water apportioned by this Compact to such state.

(d) Neither New Mexico nor Texas will oppose the construction of any facilities permitted by this Compact, and New Mexico and Texas will cooperate to obtain the construction of facilities that will be of joint benefit to the two states.

(e) The Commission may determine the conditions under which Texas may store water in works constructed in and operated by New Mexico.

(f) No reservoir shall be constructed and operated in New Mexico above Avalon Dam for the sole benefit of Texas unless the Commission shall so determine.

(g) New Mexico and Texas each has the right to construct and operate works for the purpose of preventing flood damage.

(h) All facilities shall be operated in such manner as to carry out the terms of this Compact.

ARTICLE V

(a) There is hereby created an interstate administrative agency to be known as the "Pecos River Commission." The Commission shall be composed of one Commissioner representing each of the states of New Mexico and Texas, designated or appointed in accordance with the laws of each such state, and, if designated by the President, one Commissioner representing the United States. The President is hereby requested to designate such a Commissioner. If so designated, the Commissioner representing the United States shall be the presiding officer of the Commission, but shall not have the right to vote in any of the deliberations of the Commission. All members of the Commission must be present to constitute a quorum.

(b) The salaries and personal expenses of each Commissioner shall be paid by the government which he represents. All other expenses which are incurred by the Commission incident to the administration of this Compact and which are not paid by the United States shall be borne equally by the two states. On or before November 1 of each even numbered year the Commission shall adopt and transmit to the Governors of the two states and to the President a budget covering an estimate of its expenses for the following two years. The payment of the expenses of the Commission and of its employees shall not be subject to the audit and

accounting procedures of either of the two states. However, all receipts and disbursements of funds handled by the Commission shall be audited yearly by a qualified independent public accountant and the report of the audit shall be included in, and become a part of, the annual report of the Commission.

(c) The Commission may appoint a secretary who, while so acting, shall not be an employee of either state. He shall serve for such term, receive such salary, and perform such duties as the Commission may direct. The Commission may employ such engineering, legal, clerical, and other personnel as in its judgment may be necessary for the performance of its functions under this Compact. In the hiring of employees the Commission shall not be bound by the civil service laws of either state.

(d) The Commission, so far as consistent with this Compact, shall have power to:

1. Adopt rules and regulations;

2. Locate, establish, construct, operate, maintain, and abandon watergaging stations, independently or in cooperation with appropriate governmental agencies;

3. Engage in studies of water supplies of the Pecos River and its tributaries, independently or in cooperation with appropriate governmental agencies;

4. Collect, analyze, correlate, preserve and report on data as to the stream flows, storage, diversions, salvage, and use of the waters of the Pecos River and its tributaries, independently or in cooperation with appropriate governmental agencies;

5. Make findings as to any change in depletion by man's activities in New Mexico, and on the Delaware River in Texas;

6. Make findings as to the deliveries of water at the New Mexico-Texas state line;

7. Make findings as to the quantities of water salvaged and the amount thereof delivered at the New Mexico-Texas state line;

8. Make findings as to quantities of water non-beneficially consumed in New Mexico;

9. Make findings as to quantities of unappropriated flood waters;

10. Make findings as to the quantities of reservoir losses from reservoirs constructed in New Mexico which may be used for the benefit of both states, and as to the share thereof charged under Article VI hereof to each of the states;

11. Acquire and hold such personal and real property as may be necessary for the performance of its duties hereunder and to dispose of the same when no longer required;

12. Perform all functions required of it by this Compact and do all things necessary, proper or convenient in the performance of its duites hereunder, independently or in cooperation with appropriate governmental agencies;

13. Make and transmit annually to the Governors of the signatory states and to the President of the United States on or before the last day of February of each year, a report covering the activities of the Commission for the preceding year.

(e) The Commission shall make available to the Governor of each of the signatory states any information within its possession at any time, and shall always provide free access to its records by the Governors of each of the states, or their representatives, or authorized representatives of the United States.

(f) Findings of fact made by the Commission shall not be conclusive in any court, or before any agency or tribunal, but shall constitute prima facie evidence of the facts found.

(g) The organization meeting of the Commission shall be held within four months from the effective date of this Compact.

ARTICLE VI

The following principles shall govern in regard to the apportionment made by Article III of this Compact:

(a) The Report of the Engineering Advisory Committee, supplemented by additional data hereafter accumulated, shall be used by the Commission in making administrative determinations.

(b) Unless otherwise determined by the Commission, depletions by man's activities, state-line flows, quantities of water salvaged, and quantities of unappropriated flood waters shall be determined on the basis of three-year periods reckoned in continuing progressive series beginning with the first day of January next succeeding the ratification of this Compact.

(c) Unless and until a more feasible method is devised and adpoted by the Commission the inflow-outflow method, as described in the Report of the Engineering Advisory Committee, shall be used to:

(i) Determine the effect on the state-line flow of any change in depletions by man's activities or otherwise, of the waters of the Pecos River in New Mexico.

(ii) Measure at or near the Avalon Dam in New Mexico the quantities of water salvaged.

(iii) Measure at or near the state line any water released from storage for the benefit of Texas as provided for in subparagraph (d) of this Article.

(iv) Measure the quantities of unappropriated flood waters apportioned to Texas which have not been stored and regulated by reservoirs in New Mexico.

(v) Measure any other quantities of water required to be measured under the terms of this Compact which are susceptible of being measured by the inflow-outflow method.

(d) If unappropriated flood waters apportioned to Texas are stored in facilities constructed in New Mexico, the following principles shall apply:

(i) In case of spill from a reservoir constructed in and operated by New Mexico, the water stored to the credit of Texas will be considered as the first water to spill.

(ii) In case of spill from a reservoir jointly constructed and operated, the water stored to the credit of either state shall not be affected.

(iii) Reservoir losses shall be charged to each state in proportion to the quantity of water belonging to that state in storage at the time the losses occur.

(iv) The water impounded to the credit of Texas shall be released by New Mexico on the demand of Texas.

(e) Water salvaged shall be measured at or near the Avalon Dam in New Mexico and to the quantity thereof shall be added a quantity equal to the quantity of salvage water depleted by man's activities above Avalon Dam. The quantity of water salvaged that is apportioned to Texas shall be delivered by New Mexico at the New Mexico-Texas state line. The quantity of unappropriated flood waters impounded under paragraph (d) of this Article, when released shall be delivered by New Mexico at the New Mexico-Texas state line in the quantity released less channnel losses. The unappropriated flood waters apportioned to Texas by this Compact that are not impounded in reservoirs in New Mexico shall be measured and delivered at the New Mexico-Texas state line.

(f) Beneficial use shall be the basis, the measure, and the limit of the right to use water.

ARTICLE VII

In the event of importation of water by man's activities to the Pecos River Basin from any other river basin the state making the importation shall have the exclusive use of such imported water.

ARTICLE VIII

The provisions of this Compact shall not apply to, or interfere with, the right or power of either signatory state to regulate within its boundaries the appropriation, use and control of water, not inconsistent with its obligations under this Compact.

ARTICLE IX

In maintaining the flows at the New Mexico-Texas state line required by this Compact, New Mexico shall in all instances apply the principle of prior appropriation within New Mexico.

ARTICLE X

The failure of either state to use the water, or any part therof, the use of which is apportioned to it under the terms of this Compact, shall not constitute a relinquishment of the right to such use, nor shall it constitute a forfeiture or abandonment of the right to such use.

ARTICLE XI

Nothing in this Compact shall be construed as;

(a) Affecting the obligations of the United States under the Treaty with the United Mexican States (Treaty Series 994);

(b) Affecting any rights or powers of the United States, its agencies or instrumentalities, in or to the waters of the Pecos River, or its capacity to acquire rights in and to the use of said waters;

(c) Subjecting any property of the United States, its agencies or instrumentalities, to taxation by any state or subdivision thereof, or creating any obligation on the part of the United States, its agencies or instrumentalities, by reason of the acquisition, construction or operation of any property or works of whatever kind, to make any payment to any state or political subdivision thereof, state agency, municipality or entity whatsoever, in reimbursement for the loss of taxes;

(d) Subjecting any property of the United States, its agencies or instrumentalities, to the laws of any state to an extent other than the extent to which such laws would apply without regard to this Compact.

ARTICLE XII

The consumptive use of water by the United States or any of its agencies, instrumentalities or wards, shall be charged as a use by the state in which the use is made; provided, that such consumptive use incident to the diversion, impounding, or conveyance of water in one state for use in the other state shall be charged to such latter state.

ARTICLE XIII

This Compact shall not be construed as establishing any general principle or precedent applicable to other interstate streams.

ARTICLE XIV

This Compact may be terminted at any time by appropriate action of the legislatures of both of the signatory states. In the event of such termination, all rights established under it shall continue unimpaired.

ARTICLE XV

This Compact shall become binding and obligatory when it shall have been ratified by the legislature of each State and approved by the Congress of the United States. Notice of ratification by the legislature of each State shall be given by the Governor of that State to the Governor of the other State and to the President of the United States, and the President is hereby requested to give notice to the Governor of each State of approval by the Congress of the United States.

IN WITNESS WHEREOF, the Commissioners have executed three counterparts hereof each of which shall be and constitute an original, one of which shall be deposited in the archives of the Department of State of the United States, and one of which shall be forwarded to the Governor of each State.

Done at the City of Santa Fe, State of New Mexico, this 3rd day of December, 1948.

Office - Supreme Court, U.S.
FILED
1982
ALEXANDER L. STEVAS,
CLERK

No. 65, Original

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO

ON THE REPORT AND RECOMMENDATIONS OF THE SPECIAL MASTER

EXCEPTION OF THE UNITED STATES AND SUPPORTING MEMORANDUM

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EXCEPTION OF THE UNITED STATES

The United States respectfully excepts to the Report and Recommendations of the Special Master dated September 10, 1982, insofar as the Report and Recommendations propose that the United States' representative on the Pecos River Commission be vested with power to vote to resolve any impasse created by the failure of the state representatives to agree.

REX E. LEE
Solicitor General

DECEMBER 1982

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 65, Original

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO

ON THE REPORT AND RECOMMENDATIONS OF THE SPECIAL MASTER

MEMORANDUM FOR THE UNITED STATES IN SUPPORT OF EXCEPTION

STATEMENT

1. Texas was granted leave to file this action in 1975, 421 U.S. 927; it alleged that New Mexico had violated the Pecos River Compact, ratified by the states and consented to by Congress in 1949. Ch. 184, 63 Stat. 159. The purpose of the Compact is to apportion the water of the Pecos River between the two states. The terms of the apportionment provide that New Mexico shall not deplete the flow of the river at the state line below the amount available to Texas under the "1947 condition." Art.

III(a), 63 Stat. 161. The Special Master concluded that the phrase "1947 condition" meant "that situation in the Pecos River Basin which produced in New Mexico the man-made depletions resulting from the stage of development existing at the beginning of the year 1947 and from the augmented Fort Sumner and Carlsbad acreage." *Report of Special Master on Obligation of New Mexico to Texas Under the Pecos River Compact* 52 (Aug. 13, 1979).[1] That definition was approved by this Court. *Texas* v. *New Mexico*, 446 U.S. 540 (1980).

Although the standard for compliance by New Mexico with its obligations under the Compact is now fixed, there remain several issues to be resolved before it can be determined whether Texas is entitled to relief in this action. First, the definition of the 1947 condition approved by this Court must be translated into water quantities so that there is a numerical standard against which compliance in subsequent years can effectively be measured. Second, depletions in subsequent years must be determined and measured against that standard. Both the quantification of the 1947 condition and the measurement of depletions in subsequent years will necessarily involve the exercise of some judgment. The amount of water in the Pecos River varies with the annual precipitation; it also depends upon such phenomena as flood inflows to the river, channel and reservoir losses of water through evaporation and bank storage, absorption of water by phreatophytes (vegetation such as willows and salt cedars), and returns of water to the river

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[1] The phrase "1947 condition" is defined in the Compact as "that situation in the Pecos River Basin as described and defined in the Report of the Engineering Advisory Committee." Art. II(g), 63 Stat. 160.

after diversions. There is no generally accepted method for measurement of the effects of those phenomena, though there are a number of engineering techniques available (Report and Recommendations 13-14).

When the Pecos River Compact was adopted it was contemplated that a determination of compliance with the water delivery obligations it imposed would be made in the first instance by the Pecos River Commission. Art. V(d), VI, 63 Stat. 162-164. The Compact provides for the appointment of one Commissioner representing each of the compacting states and, if designated by the President, a third Commissioner representing the United States. "[T]he Commissioner representing the United States shall be the presiding officer of the Commission, but shall not have the right to vote in any of the deliberations of the Commission." Art. V(a), 63 Stat. 162. Since 1962 administration of the Compact has been frustrated by the failure of the two state Commissioners to agree on the interpretation of the Compact's requirement.

2. The Master's Report and Recommendations were made in response to motions by the two states. New Mexico moved for a final decree and dismissal, arguing that "the Court is without power to interfere with the * * * Commission in the execution of its statutory duties, particularly the exercise of its discretion in resolving abstruse and judgmental engineering problems." Motion To Recommend Final Decree And To Dismiss And Other Motions, Memoranda, And Documents In Response To The Master's Order Of December 29, 1981, at 3. Texas moved instead that the Court adopt a new proposal for measurement of the 1947 condition. Motion To Use The Double Mass Inflow-Outflow Method To Account For Stream Flows

In The Determination Of The 1947 Condition Base Relationship. The Master recommended that

> (1) The New Mexico motion to dismiss the action be denied.
>
> (2) The Texas motion to substitute double mass analysis for river routing be denied without prejudice to consideration and action thereon by the Pecos River Commission.
>
> (3) The United States representative on the Pecos River Commission, or a third party, be vested with power to participate and act in all Commission deliberations and to vote to resolve any impasse created by failure of the representatives of Texas and New Mexico to agree.
>
> (4) Texas and New Mexico be ordered to return forthwith to the Pecos River Commission for performance by it of the duties, and exercise by it of the powers, delegated to it by the Compact.
>
> (5) The Court retain jurisdiction of the case.

Report and Recommendations 2-3.

The Master concluded that to dismiss the action could leave Texas without a remedy, and prolong delay to the advantage of New Mexico. He found, however, that because the Commission had made no findings for him to review, further proceedings would require him to " 'exercise * * * functions which are essentially legislative or administrative,' " and beyond the judicial power. Report and Recommendations 22, quoting *Federal Radio Commission* v. *General Electric Co.*, 281 U.S. 464, 469 (1930). The Master also decided that, even if it were in his power to proceed with the case, the intransigence of the states would frustrate the implementation by the Pecos River Commission of any decree he might recommend (Report

and Recommendations 23-24). The Master concluded that the proper action under these circumstances would be to exercise his equitable power by appointing a 'tie-breaker" if the states were unable, within 90 days, to agree on a tie-breaking procedure of their own (*id.* at 26).[2] "[T]he decision of the tie-breaker [would be] final, subject only to appropriate review by the Court. Upon the selection of a tie-breaker, the States should be ordered to return to the Commission for determination of this long-standing controversy." (*ibid.*).

ARGUMENT

We believe the Master erred in recommending the appointment of a tie-breaker to the Pecos River Commission, since the Compact denies the United States representative a vote, and the Compact has the force of statutory law. We also believe that translating the 1947 condition into quantities of water and proposing a method for measurement of depletions in subsequent years are proper judicial functions. Finally (though an answer to this question rests ultimately with the states), we believe that disagreement between the states need not frustrate future compliance with any decree the Master might recommend and the Court approve.[3]

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[2] The Master gave the states "a reasonable time, say ninety days," within which to agree on such a procedure (*ibid.*). The ninety-day period will expire on December 9, 1982.

[3] Although the United States initially intervened in this matter to protect certain federal and Indian water rights (see 423 U.S. 1085 (1976)), it has now been determined that the resolution of this dispute will not substantially affect the interests of the United States. Accordingly, the United States has generally acted as an observer in the proceedings before the Special Master and has actively participated only to the extent requested by the Special Master. We have never-

I. THE TERMS OF AN INTERSTATE COMPACT CANNOT BE MODIFIED BY JUDICIAL ACTION

Article V(a) of the Pecos River Compact provides that "the Commissioner representing the United States * * * shall not have the right to vote in any of the deliberations of the Commission." 63 Stat. 162. That section makes explicit the intent of the compacting states, approved by Congress, that only the state Commissioners should have the right to vote on matters within the Commission's jurisdiction. This Court recently held that "congressional consent transforms an interstate compact within [the Compact] Clause into a law of the United States * * *." *Cuyler* v. *Adams*, 449 U.S 433, 438 (1981). Through that device "the Framers sought to ensure that *Congress* would maintain ultimate supervisory power over cooperative state action * * *." *Id.* at 440 (emphasis added). In this case the Compact itself also provides for termination by legislative action in each of the signatory states, Art. XIV, 63 Stat. 165, but does not contemplate judicial modification. As events have demonstrated, it would have been preferable had the Compact included a method for resolution of deadlocks between the state Commissioners. But that defect cannot be judicially corrected. The Court can no more vary the terms of the Compact than it can amend any other statute enacted by Congress. Even if, in extraordinary circumstances, the Court might be constrained to disregard an interstate compact as unenforceable and invoke principles of equitable apportionment in dividing the waters of an interstate stream, it

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theless submitted this Exception and Supporting Memorandum because of the Master's recommendation that the Commissioner representing the United States be empowered to vote on matters before the Pecos River Commission.

does not follow that rewriting the terms of the compact is a permissible alternative.

At all events, there are independent objections to the judicial appointment of an impartial third party to resolve the states' differences. So long as such an individual was empowered to act he would of necessity be subject to control by this Court, which has frequently noted the undesirability of "continuing Court supervision over decrees of equitable apportionment of waters * * *." *Vermont* v. *New York*, 417 U.S. 270, 275 (1974). Moreover, although (as we argue in the following section) much that the Commissioners do is the appropriate subject of judicial action, the Compact also gives the Commission functions which are discretionary and inapt for judicial review by any manageable standards. Article VI(b), 63 Stat. 163, for example, declares that "[u]nless otherwise determined by the Commission," measurements shall be made on the basis of three-year periods. And Article VI(c), 63 Stat. 163, states that "[u]nless and until a more feasible method is devised and adopted by the Commission the inflow-outflow method" shall be used to make measurements of stream flows. Insofar as the tie-breaker is permitted to participate in such decisions, he "would be acting more in an arbitral rather than a judicial manner," and his action would not be subject to review "according to principles of law * * *." *Vermont* v. *New York*, *supra*, 417 U.S. at 277.

II. THE JUDICIAL POWER EXTENDS TO THE INTERPRETATION OF COMPACT TERMS, AND DETERMINATION OF COMPLIANCE WITH ITS REQUIREMENTS, WHERE THE COMMISSION HAS FAILED TO ACT

1. The Master concluded that appointment of a tie-breaker to the Pecos River Commission was necessary in part because the choice among methods for stream-flow measurement required the application of judgment and scientific expertise which are not the usual preserve of the judiciary (Report and Recommendations 21). While that is unhappily true, suits involving the apportionment of interstate waters have always presented this Court with the necessity of making such choices. As the Court stated in *Nebraska* v. *Wyoming*, 325 U.S. 589, 618 (1945):

> Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and the rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue.

Compared to such a welter of considerations, each measured only against the Chancellor's foot, the requirement that New Mexico deliver water according to the 1947 condition is relatively straightforward.

Aware of the difficulties inherent in equitable apportionment, this Court has in the past stressed its

preference for resolving disputes over interstate streams through compacts, rather than through the elaboration of federal common law. *West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22, 26-27 (1951); *Colorado* v. *Kansas*, 320 U.S. 383, 392 (1943). But the effectiveness of interstate compacts depends in the last instance on their enforceability. "It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States." *West Virginia ex rel. Dyer* v. *Sims*, *supra*, 341 U.S. at 28. Cf. *Arizona* v. *California*, 373 U.S. 546, 564 (1963).

2. Apart from the difficulty of making scientific judgments, the Master concluded that judicial enforcement of the Compact was also inappropriate at this point because the choice of methodology and values "should be made in the first instance by the administrative agency and then be subjected to judicial review" (Report and Recommendations 22). But the Compact's grant of factfinding power to the Pecos River Commission does not preclude the judicial power to make similar determinations. The Compact grants the Commission power to collect data and make factual findings concerning New Mexico's compliance with its delivery obligations. Art. V(d), VI, 63 Stat. 162-164. That power, however, is nowhere made exclusive.[4] Moreover, it is clear that the Compact contemplates judicial enforcement, since the Commission is given no enforcement power, and Article

[4] Those decisions which *were* to be the sole province of the Commission were explicitly identified. See, e.g., Art. VI(b) and (c), *supra*, page 7.

V(f), 63 Stat. 163, states that "[f]indings of fact made by the Commission shall not be conclusive in any court, * * * but shall constitute prima facie evidence of the facts found."

It is probable that those who drafted the Compact envisioned a two-stage enforcement procedure, with measurement of depletion being made in the first instance by the Commission. But it would be unrealistic to suppose that that approach was intended to be exclusive. The compact is, after all, "a law of the United States," *Cuyler* v. *Adams*, *supra*, 449 U.S. at 438, and as such creates federal rights in the compacting states. See *Delaware River Commission* v. *Colburn*, 310 U.S. 419, 427 (1940). On the other hand, "[i]n discharging their duties as officials of [the Commission], the state * * * appointees necessarily have also served the interests of the political units that appointed them." *Lake Country Estates* v. *Tahoe Planning Agency*, 440 U.S. 391, 399 (1979). Because the Compact gives each state one of the Commission's two votes, making Commission action an absolute prerequisite to judicial relief would permit a partisan state appointee to frustrate the enforcement of a federal right. Though the problem presented by this case is in some respects unique, it has obvious parallels in both public and private law.

a. The argument that the Master should refer decision on measurement of the 1947 condition and of depletion changes to the Commission is similar to the doctrine of primary jurisdiction applied in *Far East Conference* v. *United States*, 342 U.S. 570 (1952). The Court there held that in cases raising factual issues not within the usual experience of the judiciary, agencies established to make such determinations should first decide those issues. That pro-

cedure is favored even though the agency is not capable of granting the relief sought in court, and its factual determinations will only serve as a predicate for judicial action. *Id.* at 574-575. See also *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973). But the doctrine is not an inflexible requirement even where the agency to which a court defers is federal in composition and implements federal statutory policy. For example, where there are "no pervasive regulatory scheme, and no rate structures to throw out of balance," this Court has declined to require remand to an agency. *United States* v. *RCA*, 358 U.S. 334, 350 (1959). Moreover, "[s]ince * * * the doctrine of primary jurisdiction rests in part upon the need for the skill of a 'body of experts,' it would be odd to impose the doctrine when the experts deny the relevance of their skill." *Ibid.*, n.18. But it would be equally quixotic to impose the doctrine when the experts are deadlocked and unable to exercise their skill. See *United States* v. *Grace & Sons, Inc.*, 384 U.S. 424, 430 (1966); *Walker* v. *Southern Ry.*, 385 U.S. 196, 198 (1966); cf. *Rosado* v. *Wyman*, 397 U.S. 397, 405-407 (1970).

The question is similar to that presented in *Green* v. *Biddle*, 21 U.S. (8 Wheat.) 1 (1823). There Virginia and Kentucky had provided by compact that—upon the separation of Kentucky from Virginia and its admission to statehood—pre-existing private rights in lands within Kentucky should be determined by the law of Virginia. Article VIII of the compact provided for the constitution of a special tribunal for the resolution of disputes about the interpretation and execution of the compact. 21 U.S. (8 Wheat.) at 38, 46-48. To the argument that the provision for such a tribunal prevented this Court from exercising its ju-

risdiction over a dispute arising under the compact, the Court answered (*id.* at 90-91):

> How, then, are those controversies * * * to be settled? The answer, we presume, would be, by commissioners, to be appointed by those states. But none such have been appointed; what then? Suppose, either of those states, Virginia, for example, should refuse to appoint commissioners? Are the occupants of lands, to which they have no title, to retain their possessions, until this tribunal is appointed, and to enrich themselves in the mean time, by the profits of them, not only to the injury of non-residents, but of the citizens of Kentucky? The supposition of such a state of things is too monstrous to be for a moment entertained.

There is little difference between the refusal to appoint commissioners, and the appointment of commissioners who refuse to find facts about the extent of compliance. Whether such a deadlock will persist in the Commission's deliberations now that the 1947 condition has been defined (though not quantified) is a matter which the United States is not qualified to assess. The Court should consider that question in light of the submissions of Texas and New Mexico. If such an impasse is perceived as inevitable, however, there is no lack of judicial power to proceed with interpretation and enforcement of the Compact.

b. Still another perspective on the same problem may be gained from the standpoint of private law. Although congressional approval renders a compact a federal law, the underlying transaction is still an agreement between two states which is in form and substance a contract. F. Zimmerman & M. Wendell, *The Interstate Compact Since 1925* at 32, 42 (1951). Indeed, in *Green* v. *Biddle*, *supra*, this Court found

that "[i]f we attend to the definition of a contract, which is the agreement of two or more parties, to do, or not to do, certain acts, it must be obvious, that the propositions offered, and agreed to by Virginia, being accepted and ratified by Kentucky, is a contract. In fact, the terms compact and contract are synonymous * * *." 21 U.S. (8 Wheat.) at 92. The Court went on to hold that statutes enacted by Kentucky interfering with the rights created by the compact were "Law[s] impairing the Obligation of Contracts" in violation of the Contract Clause, United States Constitution, Article I, Section 10. 21 U.S. (8 Wheat.) at 92-93.

In many ways the provision in the Compact for determination of compliance by the Commission is similar to the provision typically found in construction contracts that performance be assessed and certified by an architect or engineer. In such cases the courts frequently hold that an action to enforce the obligation of payment is demurrable unless the complaint alleges the execution of the certificate of performance. See, e.g., *Peacock Construction Co.* v. *West*, 111 Ga. App. 604, 606-607, 142 S.E.2d 332, 333-334 (Ct. App. 1965); *Neale Construction Co.* v. *Topeka Township Sewage District*, 178 Kan. 359, 362-366, 285 P.2d 1086, 1089-1092 (1955); 3A A. Corbin, *Corbin on Contracts* § 650, at 115-116 (1960).[5] Nevertheless, the duty to obtain an initial determination of com-

[5] That is so even though, as here, the architect's assessment of compliance with the contract is only prima facie evidence that the work has been performed as required. See, e.g., *Plantation Foods, Inc.* v. *R.J. Reagan Co.*, 520 S.W.2d 432 (Tex. Civ. App. 1975); *James I. Barnes Construction Co.* v. *Washington Township*, 134 Ind. App. 461, 466-467, 184 N.E.2d 763, 764-765 (Ct. App. 1962); 17A C.J.S. *Contracts* § 498, at 744 (1963).

pliance with the contract can be excused, and judicial enforcement sought directly, under circumstances similar to those which may obtain in this case:

> Where a certificate of an architect, surveyor or engineer is a condition precedent to a duty of immediate payment for work, the condition is excused if the architect, surveyor or engineer
>
> (a) dies or becomes incapacitated, or
>
> (b) refuses to give a certificate because of collusion with the promisor, or
>
> (c) refuses to give a certificate after making examination of the work and finding it adequate, or
>
> (d) fails to make proper examination of the work or
>
> (e) fails to exercise an honest judgment * * *.

Restatement of Contracts § 303 (1932). In such situations, even though "[j]udges and juries may not be competent architects or skilled in determining conformity with plans and specifications," 3A *Corbin on Contracts* § 651, at 118, factual questions about performance fall to them of necessity. *Id.* at 120.

In this case the Compact provision for Commission factfinding plays the same role as an architect's certificate. When functioning properly the Commission is able to provide an expert assessment of performance in accordance with the Compact's 1947 condition which would materially assist the Master and this Court in deciding whether New Mexico has performed her obligations. The inability of the Commission to act, however, does not render the Compact unenforceable. Rather, it is properly viewed as

a condition precedent to contractual enforcement which may in proper cases be excused.

3. Issuance of a decree in this action would be proper even though its enforcement may be attended by some administrative difficulty. Once again it is worth emphasizing that enforcement of the Compact's provisions may be a less difficult undertaking than, for example, enforcement of a decree of equitable apportionment. Such decrees have historically required frequent judicial intervention to make them effective. See, e.g., *Wyoming* v. *Colorado*, 259 U.S. 419 (1922); 260 U.S. 1 (1922); 286 U.S. 494 (1932); 298 U.S. 573 (1936); 309 U.S. 572 (1940); 353 U.S. 953 (1957). Cf. *New Jersey* v. *New York*, 347 U.S. 995, 1002-1003 (1954) (appointment of River Master to administer provisions of decree regarding the yields, diversions, and releases on Delaware River). Moreover, this Court has emphasized, in the context of interstate compacts, "[t]hat judicial power essentially involves the right to enforce the results of its exertion * * * [, and] that this applies to the exertion of such power in controversies between States as the result of the exercise of original jurisdiction conferred upon this court by the Constitution * * *." *Virginia* v. *West Virginia*, 246 U.S. 565, 591 (1918).

Of course such continuing supervision is undesirable. See *Vermont* v. *New York*, *supra*, 417 U.S. at 274-275; *Nebraska* v. *Wyoming*, *supra*, 325 U.S. at 616. But there is good reason to hope that it will also be unnecessary. In the first place, this Court has generally entertained the expectation that states will resolve their differences through "mutual accommodation and agreement," *Arizona* v. *California*, 373 U.S. 546, 564 (1963); *Vermont* v. *New York*, *supra*, 417 U.S. at 274, and its confidence has proven justified. Equally important in this case, the Court has already

sustained the Master's definition of the 1947 condition, so the ground which separates the states is not as wide as it once was. The Master could, we think, properly specify the accounting techniques to be used and the assumptions to be made about stream flows in determining future compliance, so that the findings to be made by the Commission would be confined largely to matters of empirical fact. Such a decree would not necessarily undermine the role assigned to the Commission by the Compact, since the Commission could be left free—whenever it was able to agree—to make different judgments of value (as well as fact), to devise an alternative to the inflow-outflow method, and to exercise its other powers. The decree would simply provide a modus vivendi while the Commission was deadlocked.

* * * * *

We emphasize that the United States is not well situated to assess the prospects of future agreement between the states or their Commissioners. If the main parties should convince the Court that their differences have been narrowed sufficiently for the Commission to operate with unanimity, it may be proper to enforce the Master's fourth recommendation notwithstanding the fact that a tie-breaker cannot be appointed. If, on the other hand, the states have concluded that they cannot abide by the terms of the Compact, they remain free to terminate it "by appropriate action of the legislatures of both of the signatory states." Art. XIV, 63 Stat. 165. If neither of those resolutions proves possible or desirable, however, the judicial power extends to resolution of the factual and policy disputes delegated to the Commission, and may be exercised to remedy the impasse

arising from the Compact's requirements of unanimous action by the compacting states.

CONCLUSION

The Exception of the United States should be sustained. In other respects, the Court should act on the recommendations of the Special Master as it deems appropriate in light of the submissions of the compacting states.

Respectfully submitted.

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IN THE

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OCTOBER TERM, 1982

STATE OF TEXAS,
Plaintiff

v.

STATE OF NEW MEXICO,
Defendant

UNITED STATES OF AMERICA,
Intervenor

NEW MEXICO'S REPLY TO TEXAS' AND THE UNITED STATES' EXCEPTIONS AND BRIEFS IN SUPPORT OF EXCEPTIONS TO THE REPORT AND RECOMMENDATIONS OF THE SPECIAL MASTER.

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INTRODUCTION

Texas, in her exceptions and brief, supports the Master's recommendation that the Court add a third party tie-breaker to the Pecos River Commission. Alternatively, Texas argues that the Court may make the Commission's decisions on methods and

findings under the Compact. The United States excepts to the Master's recommendation that the Court appoint a tie-breaker to the Commission, but argues that the Court may make certain Commission findings. [1]

Their arguments focus on the lack of Commission action since Texas repudiated the Commission findings and began this lawsuit. Texas and the United States are, however, fixing on the wrong period and therefore proposing the wrong solutions. They should be concerned with the Commission findings that precipitated this lawsuit. The Commission's inaction pending resolution of the dispute is not the problem; it is the result of the problem. The solution is not the introduction of a third decision-maker to make findings to fill the gap, but rather judicial review of the Commission findings that Texas repudiated, causing the gap.

Until recently, the Commission's findings have been the focus of this case. The Commission's adoption of the Review of Basic Data has been the subject of the last eight years of litigation. Texas began this lawsuit with a repudiation of the Review of Basic Data. In the first phase of the suit, Texas challenged the Commission's authority to adopt the Review of Basic Data. When Texas lost in the first phase, 446 U.S. 540 (1980), she challenged piecemeal the elements of the Review of Basic Data. Now that she has relinquished all but a handful of her piecemeal challenges, she is attempting to change the direction of the suit by introducing a new method and asking the Court for administrative findings.

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[1]As used in this reply, "Texas Brief" refers to the Texas Exceptions to the Report of the Special Master and Brief in Support Thereof, filed in this case in December 1982. "United States Brief" refers to the Exception of the United States and Supporting Memorandum, filed in December 1982. "New Mexico Brief" refers to New Mexico's Exceptions to the Report of the Special Master and Brief in Support of Exceptions, also filed in December 1982.

Last year Texas proposed to the Master a new method of administration that she had devised to replace the Review of Basic Data. She asks the Court to adopt it, to apply it and to make findings using it. Texas Brief at 11-15. As justification, she asserts the Commission has not made findings for many years and that, therefore, the Court has an obligation to make findings for the Commission. Texas fails to mention that the reason the Commission has not made findings for many years is because it has been awaiting, at Texas' suggestion, the resolution of her lawsuit. Stip. Ex. 4 at 490-91, 505 (Commission meetings, Feb. 20, 1975, March 11, 1976). Having dragged out and delayed resolution of the dispute, *see e.g.*, Master's Report and Recommendations at 9-10 (filed October 18, 1982), Texas is not in a position to point to the delay and demand that the Court fill the gap.

Texas' aims are obvious. She once repudiated the Review of Basic Data and now would not be averse to having the Court forget the Review of Basic Data and make the Commission's findings anew. The Court, however, is not in a position to bypass review of the Commission's findings and instead make findings anew. It is not an administrative agency, and under Article III of the United States Constitution, the Court may exercise judicial functions only.

The Court should exercise its judicial functions by completing its review of any remaining disputes over the Commission findings. Then the Commission could go back to work and fill the gap created by this extended litigation. The longer the suit stretches, the more vulnerable New Mexico becomes to arguments such as the one Texas now makes, dismissing the Commission's findings as distant and irrelevant. New Mexico asks the Court to return the lawsuit to its proper course.

I. THE COURT SHOULD ACCEPT THE MASTER'S RECOMMENDATION THAT IT DENY TEXAS' MOTION TO SUBSTITUTE TEXAS' DOUBLE MASS ANALYSIS FOR THE RIVER ROUTING SPECIFIED UNDER THE COMPACT BECAUSE:

A. UNDER THE PECOS RIVER COMPACT AND THE UNITED STATES CONSTITUTION, THE COURT IS NOT AUTHORIZED TO SUBSTITUTE TEXAS' DOUBLE MASS ANALYSIS FOR THE RIVER ROUTING SPECIFIED UNDER THE COMPACT; AND

B. TEXAS' DOUBLE MASS ANALYSIS AS APPLIED TO THE PECOS RIVER IS ARBITRARY AND INACCURATE AND THEREFORE DOES NOT GIVE EFFECT TO THE APPORTIONMENT IN THE COMPACT.

In 1982 Texas asked the Master to change the method of administration specified in the Pecos River Compact from river routing to Texas' double mass analysis.[2] The Master rejected Texas' request and recommended to this Court that Texas' motion be denied, without prejudice to the Pecos River Commission's consideration of Texas' double mass approach. Report and Recommendations at 2 (filed Oct. 18, 1982). Texas objects to the recommendation to deny her motion. Texas Exceptions to the Report and Recommendations of the Special Master (filed Dec. 1982).

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[2] Texas' Motion to Use the Double Mass Inflow-Outflow Method to Account for Stream Flows in the Determination of the 1947 Condition Base Relationship (dated Jan. 15, 1982); *see also* Texas' Paragraph 4(b) Submission (dated April 13, 1981).

The Master, however, acted properly in recommending that the motion to substitute double mass analysis for river routing under the Compact be denied, without prejudice to Commission consideration. Only the Commission is authorized to change the method of administering the Compact; neither the Compact nor the United States Constitution allows the Court to do so. Moreover, the double mass analysis that Texas would impose on New Mexico through the Court is arbitrary and inaccurate and therefore does not give effect to the Compact apportionment of Pecos River waters.

A. Under the Pecos River Compact and the United States Constitution, the Court is Not Authorized to Substitute Texas' Double Mass Analysis for the River Routing Specified Under the Compact.

Texas' double mass analysis is not the method prescribed by the Compact for use in administering the water allocation. The Compact specifies instead: "the inflow-outflow method, as described in the Report of the Engineering Advisory Committee." Article VI(c). The inflow-outflow method described in the Report of the Engineering Advisory Committee is river routing. The Court is not authorized to change the method from a river routing process to a double mass analysis.

River routing is a detailed process accounting for every gain and loss to the river, "get [ting] down to estimates of what losses occur, why they occur, what gains occur, whether they are base inflow, whether they are surface runoff and the like." 39 Tr. 3732 l. 4-6 (Testimony of Lyman R. Flook, independent expert testifying for New Mexico).[3] The compacting states

[3] *See also* New Mexico Exhibit 54 at 6 (New Mexico's Statement Regarding Basic Facts, Unmeasured Values and Techniques for Determining Stream Flows as Required by the Special Master's December 29, 1981 Order, dated February 19, 1982).

selected the step-by-step detail of river routing to account for the difficult and variable Pecos River. Accounting accurately for stream flow in the Pecos River is the key to allocating water as prescribed by the Pecos River Compact.

The double mass analysis that Texas now proposes is not a river routing process and lacks the detailed accounting that characterizes river routing. It concerns itself with only two points on the river: an upstream gage, in this case at Alamogordo (or Sumner) Reservoir, and a downstream gage at the state line. It plots the cumulative flow at the upstream gage versus the cumulative flow at the downstream gage. *See e.g.*, Texas Exhibit 41 at 6 (Charnes and Heaney, Double Mass Inflow-Outflow Analysis of the Pecos River Compact 1947 Condition, final version dated Jan. 18, 1982).

When Texas first introduced the double mass analysis, she hailed it as "a new method of accounting";[4] but now Texas suggests that the double mass analysis was authorized by the Pecos River Compact. Texas argues that the Compact calls for use of an inflow-outflow method and the double mass analysis is an inflow-outflow method. Texas Brief at 12, 14.

Texas is wrong. The Compact does not require the use of just any inflow-outflow method: it requires the use of "*the* inflow-outflow method, *as described in the Report of the Engineering Advisory Committee.*" Article VI(c) (emphasis added). The language, read on its face and in context,[5] prescribes the use of one specific method: the inflow-outflow method as described in

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[4] Letter to Master dated April 13, 1981, accompanying Texas' Paragraph 4(b) Submission.

[5] Courts, of course, look first to the language of a statute to determine its meaning. *E.g., United States v. Turkette*, 452 U.S. 576, 580 (1981); *United States v. Oregon*, 366 U.S. 643, 648 (1961). That language should be read in context. *E.g., Richards v. United States*, 369 U.S. 1, 11 (1962).

the Report of the Engineering Advisory Committee. The inflow-outflow method there described is a process of river routing. The Report of the Engineering Advisory Committee in no way describes Texas' double mass analysis nor is there any evidence that the Compact negotiators even considered such a method. Texas' double mass analysis is, therefore, not the inflow-outflow method described in the Report of the Engineering Advisory Committee and prescribed by Article VI(c) of the Compact.

Furthermore, the Court may not substitute Texas' double mass analysis for the river routing prescribed by the Compact. Texas argues that the Court has the authority to change the method specified in the Compact, but she errs. Texas Brief at 14 ("[T]here is no question that the Court can substitute the double mass analysis for river routing"). The method specified in the Compact for measuring stream flows may be changed by the Pecos River Commission, but not by the Court.

The compacting parties authorized the Commission, upon the agreement of Texas and New Mexico, to perfect or change the method. Article VI(c) of Pecos River Compact provides the inflow-outflow method as described in the Report of the Engineering Advisory Committee shall be used "[u]nless and until a more feasible method is devised and adopted by the Commission." *See also* S. Doc. No. 109 at 116, 117 ("[T]he commission has full authority to change the method, or to perfect the technique. . . .") (Mr. Tipton's explanation of the Compact).[6] They so authorized the Commission because they wanted to allow for improvements or changes without requiring

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[6] Compact history is a valid tool for interpreting a compact, *e.g.*, *Arizona v. California*, 292 U.S. 341, 359-60 (1934), particularly where, as here, the negotiators specifically adopted the provisions of the Compact as explained by Mr. Tipton. *E.g.*, S. Doc. No. 109 at 114, 119, 121.

formal Compact amendment.[7] The Commission has never changed the method but once refined and corrected it by adopting the Review of Basic Data on the unanimous vote of the Commission. Stip. Ex. 4 at 247-48 (Commission meeting, Jan. 31, 1961).

If the Court were now to change the method prescribed in the Compact from river routing to Texas' double mass analysis, it would in effect be rewriting the Compact. It would be deleting and substituting prescriptive language in Article VI. Judicial revision of the language in the Compact would constitute an unlawful intrusion into the legislative domain, both state and federal. *E.g., Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,* 435 U.S. 519 (1978); *Southern Steamship Co. v. NLRB,* 316 U.S. 31 (1942); *California ex rel. Younger v. Tahoe Regional Planning Agency,* 516 F.2d 215 (9th Cir.), *cert. denied,* 423 U.S. 868 (1975). *See also* New Mexico Brief at 16-18.

Alternatively, if instead of rewriting the Compact, the Court simply took the place of the Commission in making the substitution, the Court would be unlawfully usurping administrative functions delegated to an interstate agency. The Compact delegates to the Pecos River Commission, not the Supreme Court, the authority to change the method specified in

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[7] Mr. Tipton, explaining the Compact on December 3, 1948, before its ratification, stated:

> We are having difficulty now in regard to one compact which involves three States, one of them being the State of Texas, where we are trying to change the schedule without changing rights and obligations. It appears that we will have to go to the legislature to change the schedule. The way the Pecos compact is written, the commission has full authority to change the method, or to perfect the technique, so long as what is done by the commission is something directed at the determination of the obligation under (a) [Article III(a) of the Compact].

S. Doc. No. 109 at 117.

the Compact. Article VI(c); S. Doc. No. 109 at 116, 117 (Mr. Tipton's explanation of the Compact). The Court has historically respected such statutory delegations. *E.g., Arizona v. California*, 373 U.S. 546, 593 (1963).[8] If the Court were now to take on the administrative function delegated to the Commission, it would be exceeding its authority under Article III of the Constitution, which permits the Court to perform only judicial, not administrative, functions.[9] *Federal Radio Commission v. General Electric Co.*, 281 U.S. 464 (1930); *Keller v. Potomac Electric Power Co.*, 261 U.S. 428 (1923). *See also* New Mexico Brief at 33-35.

Texas is thus urging the Court to take action contrary to the language of the Compact and beyond the judicial power. The Master properly rejected Texas' request and the Court should accept the Master's recommendation because the double mass analysis is not the method specified by the Compact and the Court lacks the authority to substitute it for the method specified by the Compact.

B. Texas' Double Mass Analysis as Applied to the Pecos River is Arbitrary and Inaccurate and Therefore Does not Give Effect to the Apportionment in the Compact.

The double mass analysis is, in any event, faulty and ill-suited to administration under the Pecos River Compact. Texas repeatedly advises the Court that the double mass analysis is accurate, Texas Brief at 12, 14, 15; but she fails to mention that the double mass analysis was vigorously criticized as a grossly

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[8] There the Court reversed the Master's decision apportioning shortages between states on the Colorado River because the Boulder Canyon Project Act charged the Secretary of the Interior with that responsibility; and, although he had not exercised it, the choice was his, "not the Master's or even ours." 373 U.S. at 593.

[9] The United States also takes the position that the Court may not change the method under Article VI(c) of the Compact. United States Brief at 7, 9 n. 4.

inaccurate tool for administering the Pecos River. 39 Tr. 3718-3759 (March 9, 1982); New Mexico Exhibit 50 (Review of the Texas Double Mass Proposal). It has numerous flaws, two of which are described below.

1. Texas' double mass analysis does not accurately depict the 1947 condition, which is the basis of the apportionment.

Lyman Flook, an independent expert testifying for New Mexico, reviewed Texas' double mass analysis and concluded: "I do not believe that [the double mass analysis] does establish the 1947 condition . . . ." 39 Tr. 3733 l. 21-22 (March 9, 1982). The "1947 condition" is the basis of the equitable apportionment under Article III(a) of the Pecos River Compact:

> New Mexico shall not deplete by man's activities the flow of the Pecos River at the New Mexico-Texas state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition.

In resolving the basic dispute in this case as to the meaning of the 1947 condition, the Master said:

> The 1947 condition is that situation in the Pecos River Basin which produced in New Mexico the man-made depletions resulting from the stage of development existing at the beginning of the year 1947 . . . .

Report of Special Master on Obligation of New Mexico to Texas Under the Pecos River Compact at 41 (filed Oct. 15, 1979). The Court agreed with the Master. 446 U.S. 540 (1980).

For the purpose of Compact administration the 1947 condition was arithmetically described in a river routing study accounting for actual, annual historic water supplies, adjusted to

reflect the conditions existing on the river in 1947. The initial routing study was divided into six sections, three of which represented the operation of reservoirs and three of which dealt with gains and losses in different stretches of the river channel. These sections were further broken down into 40 columns showing discrete effects of the regulation of water in the river's three reservoirs and describing various aspects of inflows to and depletions from the various stretches of the river. The routing study imposed on each of these columns the actual water supply for the 29 year period 1919-1947, and depicted the supply in each year, describing its source in snowmelt, precipitation, and ground water contribution, and illustrating its beneficial and non-beneficial use through the course of the river. Cut vertically by the 40 columns and horizontally by each year of record, the study contained 1160 individual pieces of hydrologic information, each revealing the behavior of each annual water supply as if that supply had moved down the river under the 1947 condition. [10]

The purpose of the routing study was to provide a graphic index of the historic inflows to be used as an indication of the outflows at the state line under the 1947 conditions. Accordingly, for administrative purposes, the routing study was used to construct a curve correlating the three-year running average of the index inflows against the three-year running average of the

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[10] This 40 column chart with the 1160 pieces of information appears in Appendix B to the Report of Special Master on Obligation of New Mexico to Texas Under the Pecos River Compact (filed Oct. 15, 1979). The chart represents the river routing as corrected by the Review of Basic Data.

Texas in the first phase of this case challenged the Commission's authority to make the corrections contained in the Review of Basic Data. The Master rejected Texas' challenge. He decided that the Review of Basic Data "recognizes, rather than detracts from, the obligation. It endeavors to supply a workable means of determining whether there has been a departure from the required deliveries to Texas." Report of Special Master on Obligation of New Mexico to Texas Under the Pecos River Compact at 41 (filed Oct. 15, 1979), *aff'd*, 446 U.S. 540 (1980).

routed outflows under the 1947 condition. This curve, the essence of the apportionment, is called Plate 2. *See* Stip. Ex. 5, Item 6 (Plate 2).

Variations from the base relationship of Plate 2 in the post-Compact, administrative period were to have been identified by subsequently calculating the sum of the index inflows in three-year running averages in order to ascertain from Plate 2 what the outflow should have been under the 1947 condition. By determining index inflow, and using Plate 2, it becomes a simple task to ascertain the indicated outflow under the 1947 condition. Thus determined, the apportioned outflow can be compared to the measured outflow. An increased outflow would result from water salvaged or decreased beneficial use by man's activities, and a decreased outflow would result from additional depletion by beneficial consumptive use or by non-beneficial losses. Under Article III(a) of the Compact, New Mexico is responsible for the additional depletions caused by man's activities in New Mexico. In other words, New Mexico could not make new uses of water which would deplete the flows Texas would have received in any year under the 1947 condition.

The 1947 condition was thus translated into water quantities to provide the numerical standard for measuring compliance through the routing procedure described above. Texas now wants the Court to change the standard of measurement by using her "double mass analysis method to translate the water quantities into a numerical standard." Texas Brief at 11-12. A Court ordered substitution of Texas' double mass analysis for the river routing procedure under the Compact would, however, be tantamount to rewriting the Compact; that substitution would significantly change the apportionment upon which the Compact is based because the double mass analysis does not depict the 1947 condition which is the basis of the apportionment in the Compact.

As found by the Master, adopted by the Court, and explained above, the apportionment made by the Compact is founded upon the stage of development in New Mexico under the 1947 condition. Texas' proposed double mass diagram, however, does not depict the 1947 condition for a range of flows, as does Plate 2, described above. It does not show the river's historic response to an imposed 1947 condition, as does the routing study. Instead, it is a cumulative plot of the superficial relation between annual historic conditions dating from 1915, without applying the 1947 condition. It is constructed from data points which illustrate the river's response to historical conditions, not the 1947 condition. *See e.g.*, New Mexico Exhibit 50 at 1-2, 7-8; 39 Tr. 3733-34, 3747, 3754-55 (Testimony of Lyman R. Flook, March 9, 1982). Thus in asking the Court to impose the double mass analysis, Texas is in effect asking the Court to change the apportionment in the Compact from one based on a specific stage of development (the 1947 condition) to one based on changing development which historically expanded to the 1947 condition. This change would increase New Mexico's delivery obligation by about 50,000 acre-feet a year when compared to the method upon which the Commission's findings are based. *See* New Mexico Exhibit 50, Figure 3.

Because the double mass analysis does not accurately depict the 1947 condition, it does not provide a valid measure for giving effect to the Compact obligation. It not only detracts from that obligation, it changes that obligation through the failure of its mathematical standard to define the 1947 condition, which is the basis of the apportionment in the Compact.

2. The flows at the two gaging points that Texas uses for the double mass relationship are not causally related.

An independent and equally critical failing in Texas' double mass analysis is the lack of causal relation between the two points being measured. Alamogordo Reservoir, the upstream point in the double mass analysis, receives inflow from 21 percent

of the Pecos River drainage. New Mexico Exhibit 50 at 1. In the 300 miles between Alamogordo Reservoir and the state line, the river can and does dry up completely. *Id.* In the extreme, there could be no flow at Alamogordo and yet considerable flow in the Pecos River at the state line because of accretions of water to the river below Alamogordo Reservoir. 39 Tr. 3738-40 (Testimony of Lyman R. Flook, March 9, 1982); New Mexico Exhibit 50. The water appearing at the state line thus does not necessarily come from Alamogordo Reservoir. There is no causal relationship between the amount of water flowing past Alamogordo Reservoir and the amount appearing at the state line.

A method lacking a causal relation between the two points being related will create only an arbitrary delivery obligation and system of administration. Exactly that kind of obligation and administration would be imposed by using the double mass analysis. Texas explains that on the average, New Mexico would have to deliver to Texas at the downstream gage, at the state line, an amount of water 1.22 times that which flowed past the upstream gage at the Alamogordo Reservoir. Texas Brief at 13.

Not only is the alleged relationship invalid, but also the entire method is inappropriate to accounting for stream flows on the Pecos River. A straight-line percentage basis delivery obligation, like Texas' 1.22 figure, is ill-suited to the Pecos River. The engineer advisors to those negotiating the Compact refused to recommend allocation of Pecos River water on a straight-line basis because that type of allocation could not be fairly applied to the Pecos River:

> A compact based on an allocation of water on a straight-line percentage basis is not feasible or practical. The flow of water at any point in a given stream, under natural conditions, does not bear a straight-line relation to the inflow to the stream above that point.

S. Doc. No. 109 at xxxiii-xxxiv.

By contrast the routing method embodied in the Compact accounts for the water as it moves down the river. In the channel between Alamogordo Reservoir and McMillan Reservoir, for example, the routing method analyzes diversions to the Ft. Sumner Irrigation District, returns flows to the river, channel losses, inflow from ground water aquifers, inflow from surface drainage, depletion by irrigators who pump directly from the river, and non-beneficial depletion by phreatophytes. Compared to double mass analysis, river routing is specific and thorough.

Texas' double mass analysis, unlike river routing, produces a fortuitous and inaccurate standard, one not reflecting the complexities of the Pecos River and therefore not fairly allocating its waters. Use of the double mass analysis would detract from efforts to give effect to the obligation under the Compact and would thus undermine the Court's earlier decision in this case. *Texas v. New Mexico*, 446 U.S. 540 (1980), *aff'g* Report of Special Master on Obligation of New Mexico to Texas Under the Pecos River Compact (filed Oct. 15, 1979). Texas' double mass analysis should therefore be rejected.

In summary, the Master properly refused to recommend that the Court substitute Texas' double mass analysis for that specified in the Compact, first, because the Court could not make the substitution without exceeding its Article III powers and intruding on the legislative and administrative domain and on state sovereignty; and, second, because Texas' double mass analysis produces an arbitrary and invalid delivery obligation which does not reflect the 1947 condition or the complexities of the Pecos River.

II. TEXAS' REQUEST THAT THE COURT DISREGARD THE PECOS RIVER COMMISSION'S PAST DECISIONS AND INSTEAD MAKE NEW ADMINISTRATIVE DECISIONS IN ITS PLACE SHOULD BE REJECTED BECAUSE THE COURT CANNOT MAKE THE NEW DECISIONS WITHOUT EXCEEDING THE JUDICIAL POWER.

This lawsuit arose out of Texas' unilateral repudiation in 1974 of the Review of Basic Data, *see* New Mexico Brief at 3-7, which had been adopted by the Commission in 1961, Stip. Ex. 4 at 247-48 (Commission meeting, Jan. 31, 1961), and used to reach further findings of fact in 1962. Stip. Ex. 4 at 256-57 (Commission meeting, Nov. 9, 1962). Now that the disputes on the Review of Basic Data are almost over, *see* p. 24, *infra*, Texas is steering the Court away from final resolution of those disputes and pushing the Court to impose new methods and make all new decisions under the Compact. *See* Texas Brief at 4-15. In so doing, Texas asks the Court to intercede on her behalf in the administration of the Compact, making administrative or legislative changes or both, well in excess of the Court's judicial functions under Article III of the Constitution.

A. The Court May Not Make Anew the Administrative Decisions Delegated to the Commission Without Exceeding Its Jurisdiction Under Article III of the Constitution.

Texas has little concern with the limits of judicial power. Earlier she suggested there was no line separating the judicial from the legislative function.[11] Now she argues there is no line

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[11] When the Master asked whether judicial adoption of Texas' double mass analysis would constitute an unauthorized revision of the Compact, Texas assured the Master it would not and went on to say that "rewriting the Compact may be within the judicial power." Master's Exhibit 22 at 4 (letter dated July 22, 1981 to Master from counsel for Texas).

separating the judicial from the administrative function. The line between administrative and judicial power is so fuzzy, Texas says, that there no longer is any distinction between the exercise of the two. Texas Brief at 7-8 ("This court has held repeatedly that the Constitution forbids Article III courts from exercising administrative functions, but it has never clearly defined the difference between judicial and administrative functions"). A party need only claim it seeks enforcement of a federal law, Texas argues, to justify the Court's doing or redoing administrative action entirely. [12] Texas Brief at 8-9.

The line between judicial and administrative action may appear fuzzy in some instances and nonexistent to Texas, but it is quite clear from which side of the line Article III courts derive their lawful jurisdiction. A plaintiff's broad plea to enforce a federal law does not license a judicial foray into the administrative domain.

Courts, for example, do not administer government benefits programs on a plea to enforce a federal law. *National Coal Association v. Marshall*, 510 F.Supp. 803 (D.D.C. 1981). [13] They do not conduct investigations, using administrative

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[12] To support this proposition, Texas relies on one case: *United States v. First City National Bank of Houston*, 386 U.S. 361 (1967). That case does not stand for the proposition that courts may usurp administrative functions. The case involved the question of an antitrust violation, which is and has long been essentially a judicial task. 386 U.S. at 369. Courts have not given presumptive weight to agency actions in antitrust suits. "Congress put such suits on a different axis than was familiar in administrative procedure." 386 U.S. at 367.

[13] Plaintiff there argued that it sought only to require defendants to follow the Act and their own regulations, and it stated this end could be accomplished by the court issuing a "fairly simple series of guidelines and declarations." 510 F.Supp at 806. The court refused, saying: "Preparing these 'directives and guidelines' would require the Court to manage the [Black Lung Benefits] Program and its large numbers of executive branch employees who process the tens of thousands of claims." 510 F.Supp. at 806.

agencies as an investigative arm. *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 332-33 (1976) (per curiam) (courts may not dictate to the agency the methods, procedures and time for investigation and order the results of the investigation to be reported directly to the court). They do not write rules and require agencies to adopt them, *Colorado Public Interest Research Group v. Hills*, 420 F.Supp. 582, 586 (D. Colo. 1976) ("[I]t is not this court's function to draft rules and regulations for administrative agencies to be submitted to them for promulgation"); nor do they issue administrative licenses or permits. *Florida Power & Light Co. v. Costle*, 650 F.2d 579, 590 (5th Cir. 1981); *Midwest Truck Lines, Ltd. v. ICC*, 269 F.Supp. 554, 567 (D.D.C. 1967) (three-judge district court). Courts have, thus, been able to distinguish judicial from administrative actions, recognizing those beyond the powers and qualifications of the court.

Here the Court would be undertaking administrative rather than judicial functions if it did what Texas asks it to do. It would be supplanting the Pecos River Compact Commission and administering the water allocation program in its place. The Pecos River Compact Commission is, by definition, the interstate administrative agency created to administer the Compact. Articles II(d) and V(a). As the Master observed earlier, "The Compact is not self executing. It requires continuing administration of an inconstant stream." Report of Special Master on Obligation of New Mexico to Texas Under Pecos River Compact at 34 (filed Oct. 15, 1979). The Compact therefore delegates to the Commission the authority to supplement the data in the Report of the Engineering Advisory Committee, Article VI(a); to change the method to be used in administering the allocation, Article VI(c); to make findings as to deliveries of water, depletions of water, water salvage and numerous other technical matters, Article V(d); and to do all things necessary and proper to administer the allocation of water under the Compact. Article V(d). Texas would have the Court take on all these functions, changing the method of administering

the Compact, preparing a new inflow-outflow manual, making findings as to water deliveries and depletions and taking other steps that are part of administering the Compact.

The Court cannot do what Texas asks. There is action the Court may take: the Court has the authority to review Commission findings under Article V(f) of the Compact. It may interpret the meaning of terms in the Compact. The Court may not, however, administer the Compact in place of the Commission as if it were the Commission, without improperly invading administrative functions in violation of Article III of the United States Constitution. *Federal Radio Commission v. General Electric Co.*, 281 U.S. 464 (1930); *Keller v. Potomac Electric Power Co.*, 261 U.S. 428 (1923); *see also* New Mexico Brief at 33-35.

Texas justifies her position not only by denying the existence of a distinction between administrative and judicial functions but also by quoting from *Green v. Biddle*, 21 U.S. (8 Wheat.) 1 (1823), out of context. Texas Brief at 6-7. The quote as used suggests that the Court had authority to make administrative decisions for the Compact tribunal in *Green v. Biddle* because the Compact tribunal was without appointed members. The parallel Texas seeks to draw is that the Pecos River Commission, which is not now making findings, is like the not-yet-appointed tribunal in *Green v. Biddle*, so this Court may proceed to make the Pecos River Compact Commission's decisions. *Green v. Biddle*, however, does not stand for the proposition suggested. First, the Compact tribunal there was not an administrative agency established to carry out the Compact, as is the Pecos River Commission, but rather an arbiter of disputes. Secondly, the tribunal was to be appointed only to resolve disputes between states, and the dispute before the Court was between private parties, not states. Third, the Pecos River Commission is not, in any event, similar to the not-yet-appointed tribunal in *Green v. Biddle* because it is fully constituted and operating; only the administration of water allocation is stayed, pending resolution

of this lawsuit, which in turn grew out of a dispute over Commission decisions. *Green v. Biddle* is not, therefore, sound basis for the proposition that this Court has authority to usurp the Pecos River Commission's role and take on the administration of the water allocation program under the Pecos River Compact.

The United States similarly suggests the Court may make administrative decisions, United States Brief at 8-16; but the United States has not been an active participant in this case, United States Brief at 5 n. 3, and appears to have some misunderstandings of factual and technical elements of the case. For example, the United States on the one hand advises the Court that the decision on the method to be used in measuring stream flows is the sole province of the Pecos River Commission. United States Brief at 7, 9 n. 4. The United States on the other hand says that "proposing a method for measurement of depletions . . . [is among] proper judicial functions." United States Brief at 5. A stream flow accounting method is a unified system which addresses depletions. The method for measuring stream flow is also the method for measuring depletions.

The United States' lack of active participation in the case is perhaps what led the United States to suggest that primary jurisdiction and architect certification cases provide guidance on Article III jurisdictional issues. The United States minimizes the significance of what the Court is being asked to undertake. The Court is not dealing with simple certification of performance. Nor is the question one of whether the Court would benefit by obtaining a preliminary agency decision on a question of statutory or regulatory interpretation or other similar issue over which the Court has jurisdiction.

Instead, the Court is being asked to revise and administer the water allocation program under the Pecos River Compact, for which purpose an interstate administrative agency was established; and if the primary jurisdiction analogy applies, then

the Court puts itself in the business of administering all agency programs. The administrative agency role in program development would become a matter of judicial deference, under the primary jurisdiction doctrine, and not legislative delegation, as it is now.

The problem with using the doctrine of primary jurisdiction is that it presupposes the Court has jurisdiction to administer the program; here the question is whether the Court has that jurisdiction. The doctrine of primary jurisdiction does not create jurisdiction where none exists: "it is not technically a question of 'jurisdiction' but rather a matter of judicial self restraint" where jurisdiction is concurrent. *Weidberg v. American Airlines*, 336 F.Supp. 406, 409 (D. Ill. 1972). Where there is no jurisdiction in either the reviewing court or the lower body, the doctrine of primary jurisdiction does not apply. *E.g., Armstrong v. Maple Leaf Apartments*, 508 F.2d 518 (10th Cir. 1974); *People's Telephone Cooperative v. Southwestern Bell Telephone Co.*, 399 F.Supp. 561 (D. Texas 1975). Here there is no jurisdiction in the Supreme Court to assume the administrative functions of the Pecos River Compact Commission. The issue is, therefore, the fundamental one of jurisdiction, and the doctrine of primary jurisdiction is not a relevant consideration.

The Court need not, in any event, consider taking the extreme steps and causing the extreme results posed by the United States and Texas arguments, because in urging the Court to make the decisions delegated to the Commission, the United States and Texas are addressing the wrong problem. They are trying to remedy the lack of Commission findings during the period of dispute and litigation instead of examining the Commission findings that caused the dispute and litigation. This lawsuit arose from and because of Commission decisions, particularly the Commission's adoption of the Review of Basic Data. Review of those decisions is within the traditional judicial function. Pending resolution of the lawsuit, the Commission has in effect stayed

further action, at Texas' suggestion. Stip. Ex. 4 at 490-91, 505 (Commission meetings, Feb. 20, 1975, March 11, 1976). If the Court completes the review of the Commission decisions which Texas disputed and which led her to pursue this lawsuit, then the Commission can return to its work.

B. The Court Need Not Make Administrative Decisions for the Commission but Need Only Review the Findings that the Commission Made, Which it Can Validly Do Under Article III of the Constitution.

The document at the base of this dispute is the Review of Basic Data. The United States does not mention the Review of Basic Data, nor, remarkably enough, does Texas. Texas talks about the 1947 routing study and her double mass analysis, but never mentions the existence of the Review of Basic Data. *See e.g.*, Texas Brief at 11, 14. Even when discussing the March 1982 trial, Texas does not tell the Court that Texas Exhibit 48 and New Mexico Exhibit 54 were based on the Review of Basic Data, and that the disputes between the states on those exhibits were the same as the disputes between the states over the Review of Basic Data under Paragraph 4(b) of the 1977 Pre-Trial Order. [14] *See* Texas Brief at 3.

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[14] In 1980 four disputed issues remained under Paragraph 4(b). Each corresponded to a disputed issue between Texas Exhibit 48 and New Mexico Exhibit 54 at the March 1982 trial.

Paragraph 4(b), 1977 Pre-Trial Order	March 1982 Trial	Issue
Para. 4(b)(4)	Col. 13 of routing study	base inflow between Acme and Artesia
Para. 4(b)(5)	Col. 11	channel loss versus flow relationship from Alamogordo (Sumner) Reservoir to Acme
Para. 4(b)(8)	Col. 17	loss v. flow relationship from Artesia to Damsite #3
Para. 4(b)(11)	Col. 45	depletion between Carlsbad and state line

Although she recognizes that the Commission made findings, Texas insists she does not seek review of those findings, only enforcement of the Compact. Texas Brief at 8,15. If Texas in honesty does not challenge the findings, this lawsuit is over for the Court already interpreted the meaning of the "1947 condition" in Article III(a) of the Compact in the first phase of the suit; and the second phase, the challenge to the elements of the Review of Basic Data, would then also be over. The Review of Basic Data would be undisputed and accepted under Article V(f) of the Compact. Texas, however, does not seem to accept the findings; instead, she seeks to ignore them.

Through all these years, New Mexico has looked to and relied on the Commission findings. The Commission adopted the Review of Basic Data for use "in *all actions and findings of the Commission* . . . ." Stip. Ex. 4 at 247 (Commission meeting, Jan. 31, 1961) (emphasis added). The Commission made findings which indicated New Mexico was complying with her delivery obligations under the Compact. Stip. Ex. 4 at 256-57 (Commission meeting, Nov. 9, 1962). The Commission has never changed or withdrawn the Review of Basic Data or decided that New Mexico was violating the Compact.

New Mexico relied on the Commission findings because she understood the Compact to be binding. Article XV ("This Compact shall become binding and obligatory when it shall have been ratified"). New Mexico was of the belief that unanimous Commission action under the Compact could not be unilaterally repudiated, just as the Compact may not be unilaterally repudiated. *See West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938). The Compact provision requiring unanimity for Commission action would be useless if one state were free to ignore her previous commitment to the Commission's action. It was only a matter of time, New Mexico thought, until the Court would direct Texas to honor her Compact commitments.

Now that almost a decade has passed and the disputes on the Review of Basic Data are narrowed to a mere handful, Texas is suddenly ignoring the Review of Basic Data and asking the Court to impose and apply a new method.

The Review of Basic Data, however, is the proper subject of this suit so long as Texas continues to challenge the Commission findings. The dispute on the Review of Basic Data is almost over. In 1980, Texas agreed to use all except four of the elements of the Review of Basic Data. 25 Tr. 3293 (October 20, 1980 hearing) (counsel for Texas stated: "Texas has agreed essentially to utilize the Review of Basic Data in virtually all instances. We have the four draft studies that were submitted, indicating the areas of disagreement"). [15] In July of 1982, Texas repeated: "there are but a few areas in which disagreement between the State [sic] remain concerning the river routing method." Texas' Statement in Response to the Special Master's Order dated July 29, 1982 at 2-3 (dated August 20, 1982).

Moreover, Texas earlier stated in open court that if she had an opportunity to present evidence on her double mass method and if the Master, after hearing the evidence, was dissatisfied with the method, Texas would simply accept the Review of Basic Data. 25 Tr. 3371-72, 3374, 3378 (July 27, 1981 hearing). Texas has now had her evidentiary hearing on the double mass method and the Master was dissatisfied with it. Report and Recommendations at 2, 21 (filed Oct. 18, 1982). If Texas honors her commitment to the Court, the disputes about the Review of Basic Data are over; if Texas does not honor her commitment to the Court, only a handful of disputes remain. These the Court should review and decide, to bring this lawsuit to an end and to allow the Commission to administer the Compact.

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[15] *See also* Master's Exhibits 12, 17, 18; Affidavit of Carl L. Slingerland, dated December 11, 1981, Para. 9 (Affidavit attached to New Mexico's Objections to Special Master's Order of December 1, 1981, dated Dec. 15, 1981).

The longer the Court waits, the more vulnerable New Mexico becomes to Texas' diversionary tactics, such as proposing the double mass analysis; to Texas' dismissal of what happened in 1961 and 1962 as so long ago that it no longer matters; and to Texas' threat to try to get more water for years past, 44 Tr. 4417 (March 16, 1982), despite Texas' responsibility for the years of delay in resolving this dispute. *See e.g.*, Master's Report and Recommendations at 9-10 (filed Oct. 18, 1982).

New Mexico therefore urges the Court to return this case to the Master with direction to complete his review of the Commission's findings, with a view to returning the matter then to the Commission for administration of the Pecos River Compact. If, however, no justiciable issues remain for review, the case should be dismissed and the Commission allowed to resume its work.

Respectfully submitted,

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January 1983

Supreme Court, U.S.
FILED
MAR 8 1983
ALEXANDER L. STEVAS
CLERK

NO. 65, ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

• • •

STATE OF TEXAS,

Plaintiff

V.

STATE OF NEW MEXICO,

Defendant

UNITED STATES OF AMERICA,

Intervenor

TEXAS' REPLY TO THE EXCEPTIONS OF THE UNITED STATES AND NEW MEXICO

• • •

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No. 65, Original

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

STATE OF TEXAS, *Plaintiff*

V.

STATE OF NEW MEXICO, *Defendant*

UNITED STATES OF AMERICA, *Intervenor*

TEXAS' REPLY TO THE EXCEPTIONS OF THE UNITED STATES AND NEW MEXICO

INTRODUCTION

Both the United States and New Mexico have excepted to the Master's recommendation that the United States' representative, or a third party, be vested with the power to participate and act in all Commission deliberations and to vote to resolve any impasse created by failure of the representatives of Texas and New Mexico to agree. The United States objected to the Master's conclusion that the continuation of the lawsuit is not within the judicial power of the Court. New Mexico objected to the Master's action in vacating Paragraph 4(b) of the Pre-Trial Order and to the Master's recommendation that the Court deny New Mexico's motion to dismiss. In her reply Texas will respond to the United States and New Mexico's objection to the Master's recommendation and to New Mexico's other objections and misrepresentation of questions presented and the statement of the case.

QUESTIONS PRESENTED

New Mexico continues to misrepresent this suit as one to review findings of fact made by the Commission. See New Mexico's Brief in Support of Exceptions, p. 1, No. 2. As Texas had said in her complaint and many times since filing the complaint, this is a suit to enforce the Pecos River Compact in which Texas is asking the Court to determine whether New Mexico has been making deliveries of water at the New Mexico-Texas state line in accordance with her Compact obligation. The Master agrees with Texas' view of the suit. Master's 1982 Report, p. 17.

New Mexico has been attempting since her brief in opposition to Texas' motion for leave to file her complaint to make this suit a review of agency findings or more specifically a review of the Engineer Advisory Committee's Review of Basic Data, RBD. As the Master has defined RBD in his Glossary, Appendix A, Master's 1982 Report, p. A-2, RBD is "a river routing study presented by engineers to the Commission and used by it in a limited fashion." The Master's explanation of RBD is based on his correct determination that RBD was only used by the Pecos River Commission for the determination of state line departures for the 1950-1961 period and not for future periods. Master's 1982 Report pp. 20-21; Master's 1979 Report, pp. 40-41, affirmed 446 U.S. 540. Therefore, the question presented is *not* whether the Court should review findings of fact but whether New Mexico has breached her Compact obligation and whether the continuation of the lawsuit is within the judicial function.

STATEMENT OF THE CASE

In her statement of the case, New Mexico is attempting, once again, to rewrite the history of compact administration and of this litigation. For a more accurate

and more objective discussion of the history of compact administration see Brief of the State of Texas in Response to New Mexico's Brief in Support of Affirmative Defenses, pp. 11-22, dated September 2, 1976, and the Master's 1979 Report, pp. 26-30. For a more accurate and more objective discussion of the history of the litigation see Master's 1982 Report, pp. 7-12.

An example of New Mexico's distortion of the administrative history is her statement at p. 3, "Commission efforts to administer the apportionment of water . . . were stymied at the outset because of mistakes, omissions and inconsistencies in the 1947 routing study and the accompanying inflow-outflow manual . . ." New Mexico cites Commission Minutes for Dec. 9-10, 1949, Stip. Ex. 4(b) at 7-8. However, the minutes of the Dec. 9-10, 1949, meeting shows that the Commission adopted a proposed program which included the following:

> 2. Proceed with inflow-outflow determinations in accordance with Article VI of the Compact and in conformity with the inflow-outflow manual. Inflow-outflow computations shall be made for the river sections listed in the inflow-outflow manual (p. 151 of the Senate Document 109) for three year periods commencing with the period 1947-1949.
>
> 3. Determine more accurately the "1947 Condition" as defined in the Compact:
>
> > (a) Obtain aerial photos of river bottom lands. (The committee should consider obtaining photos of all the irrigated lands below Alamogordo Reservoir).
> >
> > (b) Delineation of areas involving nonbeneficial consumption of water.

(c) The assembly and analysis of all pertinent hydrologic data available.

* * *

6. Study and investigate the items recommended in the inflow-outflow manual directed toward a more accurate determination of inflow-outflow relationships. (See last paragraph p. 150 Senate Document 109.)

Stip. Ex. 4(b), vol. 1, pp. 7-8. Contrary to New Mexico's assertions, the Commission planned to utilize the inflow-outflow manual in S.D. 109 for administration purposes and planned to augment it as directed by the manual.

Controversy in the Engineering Advisory Committee is what stymied Commission action. See Stip. Ex. 2, Minutes of EAC, April 2-3, 1957, pp. 96-110. New Mexico engineering advisor, Steve Reynolds, objected to the Inflow-Outflow Subcommittee's computations for the period 1947-1955. *Id.*, pp. 101-106. Continuing disagreement in the Engineering Advisory Committee and its failure to recommend annual accountings precipitated this lawsuit.

A complete sentence by sentence reply could be continued by Texas. However, such a review and response are not necessary because the Commission history is not essential for the Court's consideration of the Master's recommendation. Rather, New Mexico's presentation of her version of the compact administration was given to confuse and in an attempt to redefine the issues and scope of the lawsuit. Rather than dignifying New Mexico's mischaracterizations by responding to them, Texas has attached as Appendix A portions of a statement by R.B. McGowen, Jr., given to the Pecos River Commission on February 21, 1974, which will give the Court another version of the administrative history. Mr. McGowen's entire statement is found at Stip. Ex. 4(b), vol. 2, pp. 468-473.

New Mexico's version of the history of the present litigation, New Mexico's Brief in Support of Exceptions, pp. 8-13, is another attempt by New Mexico to raise RBD as the controlling issue in this lawsuit. As Texas has stated above and the Master has stated in his report, this suit is not a review of agency findings. The Master's statement of the history of the litigation, Master's 1982 Report, pp. 7-12, with Texas' explanation for the introduction of the double mass analysis method, Texas' Brief in Support of Exceptions, p. 2, is an accurate and objective discussion of the history. Texas relies upon the Master's statement of the history with Texas' modification and rejects completely New Mexico's statement of the history. Texas agrees with the Master's decision to vacate the ¶4(b) portion of the 1977 Pre-Trial Orders and his reasons therefor.

One matter that needs further explanation is Texas' position at the March 8-16, 1982, hearing. Texas presented evidence on the double mass analysis method to support her Motion to use the Double Mass Inflow-Outflow Method to Account for Stream Flows in the Determination of the 1947 Condition Base Relationship. In her presentation, Texas complied with the Master's Dec. 19, 1981, order and set out the basic facts, unmeasured values, and techniques that would be used in the double mass method.

Texas then gave in the alternative the basic facts, unmeasured values, and techniques that she would use if a river routing method was used to determine the 1947 condition base relationship and for accounting during the administration of the compact. Contrary to New Mexico's assertions, Texas was not attempting to present objections to RBD. Texas was presenting a river routing method in case the double mass was not accepted by the Master. New Mexico agreed to a substantial portion of the Texas proposed river routing but disagreed with any basic fact, unmeasured value, or

technique that varied from what was used in RBD. New Mexico Exhibit 54, pp. 8-14 and Tr. vol. XLII, pp. 4194-4243.

New Mexico's unrelenting embrace of RBD is the one obstacle to the parties agreeing to any method of accounting. This is demonstrated by New Mexico's engineering witness' testimony at the March 8-16 hearing. Tr. vol. XLII, pp. 4191 and 4231-4235. When asked how New Mexico's statement on basic facts, unmeasured values, and techniques varied from RBD, the witness replied that it only varied in three areas and the variances were the result of the decisions of the Special Master. *Id.*, p. 4191. During cross examination on a computational technique in the river routing method by a Texas attorney, New Mexico's witness admitted that a procedure proposed by Texas did not make any difference in the routing study. *Id.*, p. 4231. However, when asked if New Mexico would agree to the Texas proposed procedure, the witness refused to agree to the procedure because it was not the procedure used in RBD. *Id.*, pp. 4234-4235.

THE COURT MAY VEST THE UNITED STATES REPRESENTATIVE WITH THE POWER TO VOTE TO RESOLVE ANY IMPASSE OR, IN THE ALTERNATIVE, MAY APPOINT A PANEL TO AID THE COURT WITH TECHNICAL DECISIONS.

The Master has concluded that the equity power of the Court permits a judicial soluti n of any impasse caused by the one state veto provision of the compact. Master's 1982 Report, pp. 25-26. Accordingly, the Master has recommended that the Court vest the United States representative, or a third party, with the power "to participate and act in all Commission deliberations and to vote to resolve any impasse created by failure of the representative of Texas and New Mex-

ico to agree." Master's 1982 Report, pp. 2-3. Texas accepts the Master's recommendation. New Mexico and the United States have objected to the recommendation.

Texas adopts the Master's reasons for his conclusion that the Court has the equity power to resolve the impasse that results from the Compact provision that only the state representatives have a vote in Commission deliberations. Art. V(a). The equity power can be used to carry out the primary purpose of the Compact, i.e., to provide for the equitable division and apportionment of the use of the waters of the Pecos River. Art. I. Another purpose of the Compact is "to remove causes of present and future controversies." Art. I. The one state veto has frustrated this purpose; therefore, vesting the United States representative or a third party with the power to vote in Commission deliberations would carry out the stated purposes. The negotiators intended the Commission to aid compact administration, not hinder it. The Master's recommendation would fulfill that intention.

In response to New Mexico and the United States' argument that the Master's recommendation is rewriting the Compact, Texas submits that the Master's recommendation is no more rewriting the Compact than his definition of the 1947 condition. The Compact specifically defines the 1947 condition as "that situation in the Pecos River Basin as described and defined in the Report of the Engineering Advisory Committee." Art. II(g). However, the Master defined the 1947 condition in other terms to carry out the intent and purpose of the Compact and the Court affirmed his definition. If the Court has the power to rewrite the definition of the 1947 condition, it has the power to provide a means of resolving an impasse created by the voting provisions of the Compact. The Court's exercise of its equity power will signal other compact agencies that have no means of resolving an impasse that the intent of compacts will not be frustrated by procedural devices.

Texas submits that the Court has a choice. It may exercise its equity power as the Master recommends or it may decide to enforce the Compact by quantifying the 1947 condition as Texas has alternatively argued, Texas' Brief in Support of Exceptions, pp. 4-15, and as the United States has argued, Supporting Memorandum to the Exceptions of the United States, pp. 8-17. If the Court does not accept the Master's recommendation, the Court may decide to resolve the technical issues by appointing a panel of experts as was done in *Oklahoma v. Texas*, 260 U.S. 606 (1923). In that case, the Court was resolving a controversy over that part of the boundary between the states of Texas and Oklahoma which follows the Red River. In order to resolve the controversy, the Court had to interpret the provisions of the Treaty of 1819 between the United States and Spain. After the Court had interpreted the treaty and defined what the boundary was intended to be, the Court applied the legal definitions to the physical situation by the following procedure:

> The matter of running, locating, and marking the boundary upon the ground in accordance with the principles stated herein will be referred to three commissioners to be appointed by the court, their action to be subject to its approval.

Id. at 640.

Texas submits that the Court may use a similar procedure in this suit to translate the definition of the 1947 condition into water quantities so that there is a numerical standard against which compliance can be measured. The Court could use the existing Pecos River Commission for this purpose if the United States representative, or a third party, is given a vote in deliberations or could appoint an entirely new panel. This procedure will relieve the Master of the difficult decisions with which he is faced. Master's 1982

Report, pp. 12-15 and 21. Texas believes that if this procedure is used, the Pecos River Commission with a voting United States representative would be the most expedient panel because of its familiarity with the problems and procedures. If a completely new panel is preferred, Texas requests that the states be permitted to suggest members.

IF THE COURT DOES NOT ACCEPT THE MASTER'S RECOMMENDATIONS, THE CONTINUATION OF THE LAWSUIT IS WITHIN THE JUDICIAL FUNCTION

Texas has already argued as an alternative exception to the Master's report that the continuation of the lawsuit is clearly within the judicial power of the Court. See Texas' Brief in Support of Exceptions. The United States has made a similar argument and Texas completely agrees with and supports the United States' argument. See United States' Supporting Memorandum, pp. 8-17. New Mexico, on the other hand, argues that the Court has only the power to review Commission findings. See New Mexico's Brief in Support of Exceptions, pp. 26-36. Texas disagrees with the New Mexico position for the reasons stated in Texas' brief and the United States' brief.

New Mexico's position is based upon her mistaken belief that RBD has been adopted by the Commission for all purposes. The Master has found that RBD was only accepted and adopted for the determination of state line departures for the 1950-1961 period and not for future periods. Master's 1979 Report, pp. 40-41, affirmed 446 U.S. 540. In affirming the Master's 1979 Report the Court said, ". . . the Report is in all respects confirmed. . ." *Id.* at 540.

The only relevance that RBD has in this lawsuit is that it was used by the Commission to make the determination of state line departures during the period

1950-1961. The findings of the Commission for the state line departures during the period 1950-1961 are prima facie evidence of the facts found. Art. V(f). If Texas shows RBD to be incorrect, then she has rebutted the findings of the Commission for the period 1950-1961. This is the only part RBD plays in this lawsuit. New Mexico's continued attempts to focus attention and to place importance upon RBD in the face of the Master's rejection of her arguments is an attempt to obfuscate the real issues of this lawsuit. New Mexico is attempting to redefine the issues and the scope of the lawsuit.

New Mexico says the Master is confused. New Mexico's Brief in Support of Exceptions, p. 27. Texas contends that the Master is correct and that New Mexico is confused because she will not accept his finding regarding RBD and this Court's approval of his finding. As the Master has stated, Master's 1982 Report, p. 17, and as Texas continues to submit, this is not a suit to review Commission action. This is a suit to interpret and enforce the Compact. Texas strongly believes, and the United States agrees, that it is within the judicial power of this Court to interpret the Compact and to determine whether New Mexico has complied with the Compact requirements when the Commission has failed to act. For the above-stated reasons, New Mexico's motion to dismiss should be denied.

At the close of New Mexico's brief in support of her exceptions, New Mexico makes the gratuitous offer that if the Court grants her motion to dismiss and returns the matter to the Commission, she will recommend that a mutually agreeable mediator be employed "to assist the Commission in resuming its function." New Mexico's Brief, p. 36. New Mexico is apparently suggesting that a non-binding arbitrator be employed. A non-binding arbitrator will not give Texas an adequate remedy. It seems that New Mexico is suggesting a solution similar to that recommended by the Master but

without being bound by any action of the mediator. Such procedure would aid New Mexico because prolonging the resolution of this controversy is to the advantage of New Mexico. Master's 1982 Report, p. 15. Also, the Master correctly stated that dismissal of the suit would leave Texas without a remedy. *Id.* Until New Mexico indicates a willingness to compromise, mutual agreement between the states is doubtful. Texas is ready to discuss settling the controversy with New Mexico at any time. However, this case should not be delayed any further or dismissed on the basis of a non-binding mediation.

CONCLUSION

The Court has a choice to accept the Master's recommendations or to translate the definition 1947 condition into water quantities and determine compliance with the Compact. It is within the Court's equity power to do the former and clearly within its judicial power to do the latter. This is a suit to enforce the Pecos River Compact, not to review Commission findings. Texas prays that this suit be continued and that New Mexico's motion to dismiss be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, R. Lambeth Townsend, attorney for the State of Texas, plaintiff herein, and a member of the bar of the United States Supreme Court, certify that on this the _____ day of _____, 1982, I served copies of the foregoing by U.S. mail, postage prepaid, to counsel for New Mexico and the United States.

R. Lambeth Townsend
Assistant Attorney General

APPENDIX A

Excerpts from the statement of R.B. McGowen, Jr., Pecos River Commissioner for Texas to the Annual Meeting of the Pecos River Commissioner on February 21, 1974.

. . .

The Compact provided that the apportionment of the Pecos River water should be on the basis of the 1947 Condition of the Pecos River. The Report of the Engineering Advisory Committee, as adopted, contained the basic data which attempted to define the 1947 Condition.

On December 10, 1949, the Commission adopted a program of action for the Pecos River Commission. The program required proceeding with inflow-outflow computations as required by the Compact for the apportionment of water for the years 1947-1949. The program also called for a "more accurate determination of the '1947 Condition' as defined in the compact ..." *Minutes, Second Meeting, Pecos River Commission,* December 9, 10, 1949.

On January 18, 1951, the Commission adopted a report of the Engineering Advisory Committee which included "inflow-outflow computations" for the three-year period "1947 through 1949." The same report noted that:

> ". . . the inflow-outflow relationship for the three-year period 1946-1948 for the reach of the river from Alamogordo Dam to the New Mexico-Texas state line shown on Plate No. 2, page 154, Senate Document 109, falls below the limit of the relationship as defined by previously existing data. As more data becomes available in the future, this point may be

important to define more accurately the lower limit of the relationship as shown on the Plate." *Minutes, Sixth (Second Annual) Meeting, Pecos River Commission,* January 18, 1951.

On June 27, 1952, the Commission adopted a recommendation of the Engineering Advisory Committee which called for a "review of the inflow-outflow studies and computations heretofore made . . . ." *Minutes, Ninth Meeting, Pecos River Commission,* June 27, 1952. This recommendation apparently refers to the computations adopted at the Second Annual Meeting of the Commission on January 18, 1951.

On February 15, 1954, the Commission adopted a report of the Engineering Advisory Committee which called for a complete review of the historical inflow-outflow relationship reflected in the Report of the Engineering Advisory Committee adopted at the time the Compact was ratified. The recommendation for review was stated as follows:

> "After some discussion of the problem (computing inflow-outflow relationships) by the Committee it became apparent that the entire matter of inflow-outflow relationships should be reviewed by the subcommittee (on inflow-outflow relationships). Several years of stream flow records are now available to the Committee which were not available at the time the inflow-outflow manual was prepared. Also, more knowledge is available with respect to salt cedar coverage in the key year 1947. The subcommittee, therefore, was instructed to determine as accurately as possible the inflow-outflow relationships under the 1947 Condition and report back to the Engineering Advisory Committee at the earliest possible date in order that it may make recommendations to the Commission." *Minutes, Thirteenth (Fifth Annual) Meeting, Pecos River, Commission,* January 21, 1954, recessed to February 15, 1954.

On July 30, 1957, the Commission adopted a recommendation of the Engineering Advisory Committee that:

> "A special subcommittee be created to restudy under 1947 Conditions the inflow-outflow relationships for the reach of the River from Alamogordo Dam to the New Mexico-Texas state line. The purpose of the restudy is to determine whether the relationship depicted by the curves appearing in pages 153 and 154 of Senate Document 109, 81st Congress, 1st Session, should be modified."

The Commission also adopted a recommendation calling for a review by the subcommittee of the Inflow-Outflow Manual (adopted by the Commission at the time the Compact was signed). At the same meeting, the Commission, by official action, accepted an opinion of the Legal Committee which stated that the Commission had authority to correct any mistakes in inflow-outflow computations and criteria.

> "The Committee observed, however, that the inflow-outflow curves, graphs and plates in Senate Document 109, 81st Congress, 1st Session, are more or less sacred, and suggested that the Commission should be slow to make any changes in the curves, graphs, and plates, and then only after careful consideration with clear and convincing evidence to support the changes." *Minutes, Twenty-Second (Eighth Annual) Meeting, Pecos River Commission,* January 17, 1957, recessed to July 29, 1957.

On January 31, 1961, the Commission adopted the Review of Basic Data and all appendices as "findings of fact of the Commission." *Minutes of the Twenty-Seventh (Twelfth Annual) Meeting, Pecos, River Commission,* January 19, 1961, recessed to January 31, 1961.

On November 9, 1962, the Commission adopted as "findings of fact" a report of the Engineering Advisory Committee which specifically spelled out the "departure of the 1947 Condition, State Line Outflow, period 1950 through 1961.' The departures included in the report were computed by using the analyses contained in the Review of Basic Data adopted by the Commission on January 31, 1961, and showed an accumulated departure of 53,300 acre-feet. The Report of the Engineering Advisory Committee spelling out the "departure of the 1947 Condition" also showed accumulated departures of 48,000 acre-feet from 1955 through 1961 resulting from the training dike at McMillan Reservoir and stated that "these departures are not chargeable (as a depletion) as a result of man's activities." *Minutes, Twenty-Eighth (Thirteenth Annual) Meeting, Pecos River Commission,* January 18, 1962, recessed to November 9, 1962.

On July 1, 1970, the Texas members of the Engineering Advisory Committee, assisted by the Texas Water Rights Commission, completed a full accounting report of the Pecos River water. The computations were performed in accordance with the basic data included in Senate Document 109. The report showed an accumulative departure from the 1947 Condition of 1,213,600 acre-feet and concluded that "about 1,100,000 acre-feet of the total departure of state-line flow from 1947 Conditions is chargeable to New Mexico as being man-made depletions." *Accounting Pecos River Waters, 1950-1969 Under The Pecos River Compact,* Technical Services Division, Texas Water Rights Commission, July 1, 1970.

On January 28, 1971, the Texas Engineer Advisors and the New Mexico Engineer Advisors submitted separate reports to the Pecos River Compact Commission. The Texas report described the computation methods and data used in the July 1, 1970, accounting report as being in conformity with the basic data and methods described in Senate Document 109. The Texas

report contended that the methods and data described were the only ones which could be used under the Compact.

The use of the basic data and computation methods contained in Senate Document 109 results in an allocation to Texas of approximately 39,000 acre-feet of water per year more than is allocated by using the data and computation methods contained in the Review of Basic Data. (Letter to R.B. McGowen, Jr., Pecos River Commissioner, from James A. Luscombe, Sr., Texas Interstate Compacts Coordinator, dated June 10, 1969).

. . .

See Stip. Ex. 4(b), vol. 2, pp 468-473 for entire statement.

65

NO. 65 Orig.	TITLE State of Texas, Plaintiff, v. State of New Mexico

DOCKETED	COURT
June 27, 1974	Bill of complaint

DATE	PROCEEDINGS AND ORDERS
	Counsel for plaintiff: John L. Hill, R. Lambeth Townsend
	Counsel for defendant: Richard A. Simms
June 27, 1974	Motion for leave to file bill of complaint filed.
Aug. 28, 1974	Brief in opposition of State of New Mexico filed.
Sept. 5, 1974	DISTRIBUTED. SL17P3
Oct. 10, 1974	Memorandum for the U. S. filed.
Oct. 16, 1974	Response to memorandum of U. S. requested.
Nov. 1, 1974	Response of the State of New Mexico to the memorandum for th U.S. filed.
Nov. 18, 1974	Application of State of Texas for an extension of time to file response to memorandum of U. S. filed, and order granting same until 1-5-75 (Burger, CJ, 11-26-74)
Jan. 3, 1975	Brief of State of Texas in response to New Mexico's brief in opposition and to memorandum of the U. S. filed.
Jan. 9, 1975	REDISTRIBUTED.
Mar. 12, 1975	Supplemental memorandum for the U.S. filed.
Apr. 3, 1975	REDISTRIBUTED.
Apr. 21, 1975	Motion for leave to file bill of complaint GRANTED and defendant is allotted sixty days to answer. Douglas, J., OUT.

June 19, 1975	Answer of State of New Mexico filed.
July 31, 1975	Above DISTRIBUTED. SL9P3
Aug. 27, 1975	Motion for appointment of Special Master filed.
Aug. 20, 1975	Motion of U. S. for leave to intervene filed.
Sept. 12, 1975	Response of New Mexico to motion of U. S. for leave to intervene filed.
Oct. 2, 1975	Motion of U. S. for leave to intervene DISTRIBUTED.10-1
Oct. 9, 1975	Response of U. S. to State of New Mexico's objections to the complaint in intervention filed. (D)

(over)

65 Orig.

Title

No.

DATE	PROCEEDINGS AND ORDERS
Oct. 28, 1975	Motion of U.S. for leave to intervene and motion for appointment of Special Master DISTRIBUTED. 10-31
Nov. 11, 1975	Ordered that Hon. Jean Sala Breitenstein, Senior Judge for the USCA-10 be appointed Special Master in this case. Motion of the U. S. for leave to intervene is referred to the Special Master. Douglas, J., OUT.
Jan. 7, 1976	Report of Special Master on Motion of United States for leave to intervene as plaintiff filed.
Jan. 8, 1976	Above Report DISTRIBUTED. 1-23
Jan. 24, 1976	Above Report received and ordered filed. Motion for leave to intervene GRANTED.
Aug. 29, 1977	Report of Special Master on affirmative defenses of New Mexico filed.
Sept. 13, 1977	Above report DISTRIBUTED. SL18P71
Oct. 3, 1977	Report of Special Master ordered filed.
Sept. 14, 1979	Report of Special Master on Obligation of New Mexico to Texas Under the Pecos River Compact received.
Sept. 26, 1979	DISTRIBUTED. 10-12. (Above report of Special Master).
Oct. 15, 1979	The Report of the Special Master on Obligation of New Mexico to Texas under the Pecos River Compact is received and ordered filed. Exceptions, if any, together with supporting briefs to the Report may be filed by the parties within 45 days. Replies, if any, with supporting briefs, to such exceptions may be filed within 30 days.
Nov. 29, 1979	Objections of New Mexico to Report of Special Master filed.
Nov. 30, 1979	Objections of the State of Texas to the Report of the Special Master filed.
Dec. 28, 1979	Reply of New Mexico to Texas's objection filed.
Dec. 31, 1979	Texas' reply to New Mexico's objections to the Masters report filed.
Jan. 9, 1980	DISTRIBUTED. 2-15. (Objections and replies to Report of Special Master on the obligation of New Mexico to Texas under the Pecos River compact.)
Feb. 2, 1980	Memorandum for the United States filed. (D).
Feb. 9, 1980	Motion of New Mexico to strike response of United States filed.
Feb. 12, 1980	DISTRIBUTED. 2-15. (Above motion).

(CARD No. 2)

NO. 65 Original	TITLE State of Texas, Plaintiff, v. State of New Mexico

DOCKETED	COURT
June 27, 1980	Bill of Complaint

DATE	PROCEEDINGS AND ORDERS
Feb. 19, 1980	The motion of New Mexico to strike the response of the United States is DENIED. The alternative request to file a reply is GRANTED. The Objections to the Report of the Special Master on the obligations of New Mexico to Texas under the Pecos River Compact are set for oral argument in due course.
Feb. 29, 1980	CIRCULATED.
Mar. 24, 1980	ARGUED. (On Objections to Report of Special Master).
May 19, 1980	Upon consideration of the Report filed October 15, 1979, by Senior Judge Jean S. Breitenstein, Special Master, and the Exceptions thereto, and on consideration of briefs and oral argument thereon, It is ADJUDGED, ordere and decreed that all Exceptions are overruled, the Report is in all respects confirmed, and the ruling of the Special Master on the "1946 condicition" as that term appears in Artx. 11 (g) and 111 (a) of the Pecos River Compact is approved. (Per Curiam Opinion). Dissenting opinion by Stevens, J.
June 3, 1980	Petition for rehearing filed.
June 11, 1980	DISTRIBUTED. SL3P4. (Rehearing).
June 20, 1980	REDISTRIBUTED. 6-25.
June 30, 1980	Rehearing DENIED.
Nov. 30, 1981	The order of November 11, 1975, is amended to add the word LEGAL to the second sentence of the second paragraph to the order appointing the Special Master. (See order).
Sept. 28, 1982	Report of the Special Master received.
Sept. 29, 1982	DISTRIBUTED. 10-15. (Report of Special Master).
Oct. 18, 1982	The report of the Special Master is received and ordered filed. Exceptions to the Report, with supproting briefs, may be filed by the parties within 45 days. Replies to such Exceptions, with supporting briefs, may be filed within 30 days.
Dec. 1, 1982	Exceptions to the Report of the Special Master by New Mexico filed.
Dec. 3, 1982	Exceptions to the Report of the Special Master filed by the United States.
Dec. 3, 1982	Exceptions to the Report of the Special Master filed by the State of Texas.
Jan. 5, 1983	Reply brief of State of New Mexico to Texas' and the U.S.' exceptions and briefs in support of exceptions to the Report and Recommendations of the Special Master filed.

(OVER)

65 Original

Title

No.

DATE	PROCEEDINGS AND ORDERS
Jan. 5, 1983	DISTRIBUTED. January 21, 1983. (Exceptions of the Special Master, et al., 12/1, 12/3, 12/3.)
Dec. 29, 1982	Statement of receipts and disbursements by Special Master received.
Jan. 8, 1983	Texas' reply to the Exceptions of the United States and New Mexico filed. (D).
Jan. 24, 1983	The Exceptions to the Report of the Special Master are set for oral argument in due course.
Feb. 15, 1983	CIRCULATED.
March 28, 1983	Record filed. (6 boxes)
March 30, 1983	ARGUED.